

### 3 Am. Jur. 2d Adverse Possession IV A Refs.

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

Barbara J. Van Arsdale, J.D., Janice Holben, J.D. and Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.

#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#) 🔑 104 to 109

#### A.L.R. Library

A.L.R. Index, Adverse Possession

West's A.L.R. Digest, [Adverse Possession](#) 🔑 104 to 109

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### 3 Am. Jur. 2d Adverse Possession § 231

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#### Adverse Possession

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 1. Prior to Expiration of Statutory Period

## § 231. Generally; between record owner and adverse claimant

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#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  104, 106(1) to 106(5)

The mere fact that one is in possession of real property under an adverse claim or color of title does not prevent the legal owner from proceeding, by ejectment or otherwise, for the purpose of repossessing the land at any time prior to the expiration of the statutory period.<sup>1</sup> In some states, statutes may expressly authorize the recovery for use and occupation against one whose possession from the beginning was adverse and hostile to the true owner.<sup>2</sup>

#### Observation:

The effect of adverse possession is subject to change by statute at any time before the lapse of the statutory period.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Jasperson v. Scharnikow](#), 150 F. 571 (C.C.A. 9th Cir. 1907).  
As to conversion, see [Am. Jur. 2d, Conversion](#) §§ 1 et seq.  
As to replevin, see [Am. Jur. 2d, Replevin](#) §§ 1 et seq.

<sup>2</sup> [Sheppard v. Coeur d'Alene Lumber Co.](#), 62 Wash. 12, 112 P. 932 (1911).

<sup>3</sup> [Preston v. Smith, 41 Tenn. App. 222, 293 S.W.2d 51 \(1955\).](#)

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### 3 Am. Jur. 2d Adverse Possession § 232

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##### A. Overview; Title or Right Acquired

##### 1. Prior to Expiration of Statutory Period

## § 232. With respect to strangers or subsequent intruders

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  104 to 109

The possession of one holding in adverse possession is good as against strangers. The adverse claimant is not an outlaw and has a right to remain peaceably in possession until expelled by the owner or someone who can show a superior right of possession.<sup>1</sup>The courts will protect the adverse claimant against all the world except the true owner.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Hallmark v. Baca, 61 N.M. 420, 301 P.2d 527 \(1956\).](#)

<sup>2</sup> [Spring Val. Estates, Inc. v. Cunningham, 181 Colo. 435, 510 P.2d 336 \(1973\); Howard v. Mitchell, 268 Ky. 429, 105 S.W.2d 128 \(1936\).](#)

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##### A. Overview; Title or Right Acquired

##### 1. Prior to Expiration of Statutory Period

## § 233. Right to challenge tax deed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  104 to 109

Where an adverse claimant is in possession of land under a claim of ownership prior to the accrual of a lien for state and county taxes and the foreclosure of such lien by a tax sale, and the claimant has such possession as to enable him or her to perfect title by adverse possession, the claimant's rights are undoubtedly affected by the making of the tax deed in pursuance of the sale, and the claimant therefore has the right to challenge the sufficiency of the foreclosure proceedings and the tax deed under which the purchasers at the tax sale obtained their title.<sup>1</sup>If, however, the issuance of the tax deed is determined to be valid, any title acquired by adverse possession prior thereto effectively vanishes.<sup>2</sup>Thus, one claiming title by adverse possession may question a tax deed where the adverse possession antedated the lien for the taxes.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Shaw v. Armstrong](#), 361 Mo. 648, 235 S.W.2d 851 (1951) (overruled in part on other grounds by, [Journey v. Miler](#), 363 Mo. 163, 250 S.W.2d 164 (1952)).

As to tax deeds, generally, see [Am. Jur. 2d, State and Local Taxation](#) §§ 874 to 888.

<sup>2</sup> [Linville v. Russell](#), 168 Colo. 459, 452 P.2d 18 (1969).

<sup>3</sup> [King v. Fasching](#), 234 S.W.2d 549 (Mo. 1950).

As to the aggressive use of the title acquired by adverse possession, see [§ 240](#).



### 3 Am. Jur. 2d Adverse Possession § 234

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##### A. Overview; Title or Right Acquired

##### 1. Prior to Expiration of Statutory Period

## § 234. Right to redeem from tax sale

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  104 to 109

Generally, a person in possession of property sold for taxes, claiming adversely to the rights of the original owner or the world in general, is, within statutory definitions, an “owner” of land or a “person interested” in the land and is entitled to redeem from a tax sale.<sup>1</sup> The circumstance that the adverse occupancy did not extend for the full period necessary to give good title by adverse possession is immaterial insofar as the result reached is concerned.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Parsons v. Prudential Real Estate Co.](#), 86 Neb. 271, 125 N.W. 521 (1910); [Turner v. Sanchez](#), 50 N.M. 15, 168 P.2d 96, 164 A.L.R. 1280 (1946).

<sup>2</sup> [Turner v. Sanchez](#), 50 N.M. 15, 168 P.2d 96, 164 A.L.R. 1280 (1946).  
As to redemption rights in tax sales, generally, see [Am. Jur. 2d, State and Local Taxation](#) §§ 889 to 931.

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##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### a. Nature of Title Generally

## § 235. Grant of title upon expiration of statutory period

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(4)

Generally, title is acquired by an adverse possession of the land for the prescribed period of time,<sup>1</sup> or upon the expiration of the period, there is created a conclusive presumption of title.<sup>2</sup> An adverse possession of land for the period of limitation operates of itself as a grant of all adverse title and interests to the occupants.<sup>3</sup> No judicial action is necessary to effectuate transfer.<sup>4</sup> However, the level of use determines whether the claimant has acquired fee title of the estate via adverse possession or merely a prescriptive easement; the fee simple title, rather than a mere easement, is acquired if all the required elements of adverse possession are met.<sup>5</sup>

If a claimant satisfies the requirements of adverse possession while land is privately owned, the adverse possessor is automatically vested with title to the subject property; the prior owner cannot extinguish this title by transferring record title to the government.<sup>6</sup>

#### Observation:

Statutes of limitation are not unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder.<sup>7</sup>



## CUMULATIVE SUPPLEMENT

### Cases:

Possessors of disputed real property did not have a vested property interest under the adverse possession statute on the effective date of statutory amendment increasing the adverse possession period from five to 20 years, and thus application to them of the amended statute would not affect any of their rights and did not constitute a retroactive application of the amendment; adverse possession statute created a vested right only once an adverse possessor complied with all of its requirements, and possessors had adversely possessed the property for only four years and eight months on the effective date of the amendment. [Idaho Code Ann. § 5-210](#). [Schoorl v. Lankford](#), 389 P.3d 173 (Idaho 2017).

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### Footnotes

- <sup>1</sup> [Guaranty Title & Trust Corp. v. U. S.](#), 264 U.S. 200, 44 S. Ct. 252, 68 L. Ed. 636 (1924); [McKinney v. Hindman](#), 86 Or. 545, 169 P. 93, 1 A.L.R. 1476 (1917) (possession under grant from the State); [Stryker v. Rasch](#), 57 Wyo. 34, 112 P.2d 570, 136 A.L.R. 770 (1941).
- <sup>2</sup> [Barry v. Thomas](#), 273 Ala. 527, 142 So. 2d 918 (1962).
- <sup>3</sup> [Wanha v. Long](#), 255 Neb. 849, 587 N.W.2d 531 (1998).
- <sup>4</sup> [Colquhoun v. Webber](#), 684 A.2d 405 (Me. 1996); [Helm v. Clark](#), 2010 WY 168, 244 P.3d 1052 (Wyo. 2010).
- <sup>5</sup> [Tenala, Ltd. v. Fowler](#), 921 P.2d 1114 (Alaska 1996).
- <sup>6</sup> [Gorman v. City of Woodinville](#), 175 Wash. 2d 68, 283 P.3d 1082 (2012).
- <sup>7</sup> [Short v. Texaco, Inc.](#), 273 Ind. 518, 406 N.E.2d 625 (1980), judgment aff'd, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).

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##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### a. Nature of Title Generally

## § 236. Extent of title

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(1) to 106(5)

The title that the adverse claimant possesses is such that the title of the original owner is extinguished<sup>1</sup> or destroyed,<sup>2</sup> and legal title to the land is transferred from the owner to the adverse possessor.<sup>3</sup> Thus, such right and title are good not only as against strangers but also as against the former owner.<sup>4</sup> Adverse possession cannot, however, result in a greater property interest than the dispossessed owner enjoyed.<sup>5</sup>

Generally, unless a contract for the sale of land calls for a record title, title by adverse possession is sufficient to constitute marketable title which a purchaser must accept.<sup>6</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Adverse possession operates to divest title to the land at issue whereas the rights of prescriptive easement in land are measured and defined by the use made of the land giving rise to the easement. [Bundy v. Shirley](#), 412 S.C. 292, 772 S.E.2d 163 (2015).

[END OF SUPPLEMENT]

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Footnotes

- <sup>1</sup> McNeil v. Ketchens, 397 Ill. App. 3d 375, 341 Ill. Dec. 616, 931 N.E.2d 224 (4th Dist. 2010) (titleholder is divested of ownership); Knauff v. Hovermale, 976 N.E.2d 1267 (Ind. Ct. App. 2012); Beach v. Township of Lima, 489 Mich. 99, 802 N.W.2d 1 (2011); Gabler v. Fedoruk, 756 N.W.2d 725 (Minn. Ct. App. 2008); Fairdealing Apostolic Church, Inc. v. Casinger, 353 S.W.3d 396 (Mo. Ct. App. S.D. 2011) (the record owner is divested); Marky Inv., Inc. v. Arnezeder, 15 Wis. 2d 74, 112 N.W.2d 211 (1961).
- <sup>2</sup> Scottish Am. Mortg. Co. v. Butler, 99 Miss. 56, 54 So. 666 (1911); Stolfa v. Gaines, 1929 OK 487, 140 Okla. 292, 283 P. 563 (1929).
- <sup>3</sup> Franza v. Olin, 73 A.D.3d 44, 897 N.Y.S.2d 804 (4th Dep't 2010).
- <sup>4</sup> Russell v. McIntosh, 179 Ky. 677, 201 S.W. 33 (1918); Saxon v. Saxon, 242 Miss. 491, 136 So. 2d 210 (1962); City of South Greenfield v. Cagle, 591 S.W.2d 156 (Mo. Ct. App. S.D. 1979); Riverwood Commercial Properties, Inc. v. Cole, 138 N.H. 333, 639 A.2d 714 (1994); State Bank & Trust of Kenmare v. Brekke, 1999 ND 212, 602 N.W.2d 681 (N.D. 1999) (holding that the adverse claimant's title and right eliminate the title and right of ejectment in the title owner); Williams v. Bailey, 1954 OK 19, 268 P.2d 868 (Okla. 1954).
- <sup>5</sup> B.B. & C. Partnership v. Edelweiss Condominium Ass'n, 218 P.3d 310 (Colo. 2009).
- <sup>6</sup> Messer-Johnson Realty Co. v. Security Savings & Loan Co., 208 Ala. 541, 94 So. 734 (1922); Smith v. Biddle, 171 Ark. 644, 286 S.W. 801 (1926); Willingham Loan & Trust Co. v. Moore, 163 Ga. 679, 136 S.E. 795 (1927); Christopher v. West, 345 Ill. App. 515, 104 N.E.2d 309 (3d Dist. 1952); Summers v. Hively, 78 W. Va. 53, 88 S.E. 608 (1916).

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##### 2. After Expiration of Statutory Period

##### a. Nature of Title Generally

## § 237. Character of title acquired

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#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(5)

Title acquired by adverse possession is a corporeal right.<sup>1</sup> Title so acquired is a new and independent title by operation of law and is not in privity in any way with any former title.<sup>2</sup> Generally, the result of the statute of limitations is so absolute that an adverse possession operates thereunder as a transfer of the legal title,<sup>3</sup> and thus, it is as effective as a formal conveyance<sup>4</sup> by deed or patent from the government<sup>5</sup> or by deed from the original owner.<sup>6</sup>

A title acquired by adverse possession is in every respect as good as a title by deeds running back to the government.<sup>7</sup> In fact, it is an absolute,<sup>8</sup> complete,<sup>9</sup> and perfect legal title<sup>10</sup> in fee simple,<sup>11</sup> carrying all of the remedies attached thereto.<sup>12</sup> It is as strong as a title obtained by grant.<sup>13</sup> However, a title acquired by adverse possession is not a marketable title until the title is established by judicial proceedings against the record owner.<sup>14</sup>

Title to property obtained through adverse possession can be lost only by proper transfer, such as deed, will, or intestacy, or by another period of possession ripening title in a new adverse user.<sup>15</sup> Thus, after the running of the statute, the adverse possessor has an indefeasible title which can only be divested by conveyance of the land to another<sup>16</sup> or by a subsequent ouster for the statutory limitation period.<sup>17</sup>

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#### Footnotes

<sup>1</sup> [Downing v. Bird, 100 So. 2d 57 \(Fla. 1958\).](#)

<sup>2</sup> [Pearson v. Hasty, 1943 OK 179, 192 Okla. 425, 137 P.2d 545, 147 A.L.R. 232 \(1943\).](#)

3 Calvert v. Murphy, 73 W. Va. 731, 81 S.E. 403 (1914).

4 Counce v. Yount-Lee Oil Co., 87 F.2d 572 (C.C.A. 5th Cir. 1937); Jasperson v. Scharnikow, 150 F. 571 (C.C.A. 9th Cir. 1907); Barry v. Thomas, 273 Ala. 527, 142 So. 2d 918 (1962); Strong v. Baldwin, 154 Cal. 150, 97 P. 178 (1908); Morris v. McCaskill Inv. Co., 92 Fla. 1045, 118 So. 490 (1926); Te Selle v. Storey, 133 Mont. 1, 319 P.2d 218 (1957); Stolfa v. Gaines, 1929 OK 487, 140 Okla. 292, 283 P. 563 (1929).

5 Sanderson v. McManus, 252 S.W.2d 351 (Mo. 1952); Gibbs v. Lester, 41 S.W.2d 28, 80 A.L.R. 431 (Tex. Comm'n App. 1931); Thornely v. Andrews, 40 Wash. 580, 82 P. 899 (1905).

6 Niederheman v. Niederheman, 336 S.W.2d 670 (Mo. 1960); Thornely v. Andrews, 40 Wash. 580, 82 P. 899 (1905).

7 King v. Fasching, 234 S.W.2d 549 (Mo. 1950).

8 Vidmer v. Lloyd, 193 Ala. 386, 69 So. 480 (1915).

9 Itawamba County v. Sheffield, 195 Miss. 359, 13 So. 2d 649 (1943); Frank v. Smith, 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 458 (1940).

10 Wallace v. Ayres, 228 Ark. 1007, 311 S.W.2d 758 (1958); Creel v. Hammans, 234 Iowa 532, 13 N.W.2d 305 (1944); Gabler v. Fedoruk, 756 N.W.2d 725 (Minn. Ct. App. 2008); Scottish Am. Mortg. Co. v. Butler, 99 Miss. 56, 54 So. 666 (1911).

11 Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914); Wallace v. Ayres, 228 Ark. 1007, 311 S.W.2d 758 (1958); Knauff v. Hovermale, 976 N.E.2d 1267 (Ind. Ct. App. 2012); Meyers v. Canutt, 242 Iowa 692, 46 N.W.2d 72, 24 A.L.R.2d 1 (1951); Niederheman v. Niederheman, 336 S.W.2d 670 (Mo. 1960); Preston v. Smith, 41 Tenn. App. 222, 293 S.W.2d 51 (1955); Thornely v. Andrews, 40 Wash. 580, 82 P. 899 (1905).

12 Toltec Ranch Co. v. Cook, 191 U.S. 532, 24 S. Ct. 166, 48 L. Ed. 291 (1903).

13 Franza v. Olin, 73 A.D.3d 44, 897 N.Y.S.2d 804 (4th Dep't 2010).

14 Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC, 205 Cal. App. 4th 999, 141 Cal. Rptr. 3d 109 (5th Dist. 2012), as modified on denial of reh'g, (May 30, 2012) and review denied, (July 18, 2012).

Acquisition of title through adverse possession includes the right to defend the possession and to protect the property against the trespass of all others; but title acquired by adverse possession is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree. *Beach v. Township of Lima*, 489 Mich. 99, 802 N.W.2d 1 (2011).

15 Taylor v. Bell, 87 So. 3d 1134 (Miss. Ct. App. 2012).

Title acquired through adverse possession cannot be divested by acts other than those required to transfer a title acquired by deed. *Gorman v. City of Woodinville*, 175 Wash. 2d 68, 283 P.3d 1082 (2012).

16 Crowden v. Grantland, 510 So. 2d 238 (Ala. 1987); Davis v. Haines, 349 Ill. 622, 182 N.E. 718 (1932); Lurvey v. Burrell, 317 S.W.2d 458 (Mo. 1958).

17 Barry v. Thomas, 273 Ala. 527, 142 So. 2d 918 (1962); Sparks v. Douglas & Sparks Realty Co., 19 Ariz. 123, 166 P. 285 (1917); Strong v. Baldwin, 154 Cal. 150, 97 P. 178 (1908); Oahu Railway & Land Co. v. Kaili, 22 Haw. 673, 1915 WL 1423 (1915); Davis v. Haines, 349 Ill. 622, 182 N.E. 718 (1932); Lurvey v. Burrell, 317 S.W.2d 458 (Mo. 1958); Laurin v. Wyroski, 20 Wis. 2d 254, 121 N.W.2d 764 (1963).

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##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### a. Nature of Title Generally

## § 238. Character of title acquired—Acts after title acquired

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(5)

After title has been acquired by adverse possession, it is not necessary to continue holding the land adversely; thus, the failure to continue to hold the land adversely will not defeat the title already acquired, nor will it reinvest the title in another.<sup>1</sup> Title to property obtained through adverse possession can be lost only by proper transfer, such as deed, will, or intestacy, or by another period of possession ripening title in a new adverse user.<sup>2</sup> Thus, once title is vested in adverse possessors, they do not have to continue adversely possessing the property in order to retain title to it,<sup>3</sup> nor are they required to preserve structured enclosures or fences separating the property.<sup>4</sup>

The purchase or attempted purchase of an outstanding title by one in adverse possession, after the expiration of the statutory period, is not sufficient to break the continuity of possession or divest it of its adverse character although the occupant may believe that he or she is thereby acquiring the true title.<sup>5</sup> Thus, the validity of a title perfected by adverse possession is not impaired by a subsequent offer to pay the record title claimants for a quitclaim deed of their interests, made for the purpose of avoiding litigation.<sup>6</sup> An offer of settlement does not amount to a disclaimer of the right to title.<sup>7</sup> Similarly, grantees who take title from a grantor who had obtained the property by adverse possession cannot lose that title by attempting to secure an agreement with another to establish a boundary line in order to settle a dispute and avoid possible litigation.<sup>8</sup>

The title acquired by adverse possession cannot be lost by a mere abandonment, or by a cessation of occupancy,<sup>9</sup> or by an expression of willingness to vacate the land,<sup>10</sup> or by the acknowledgment or recognition of title in another,<sup>11</sup> or by subsequent legislation,<sup>12</sup> or by survey.<sup>13</sup>

Title by adverse possession is sufficient to sustain a judgment for plaintiff in an action to quiet title.<sup>14</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Adverse holders of real property were divested of their ownership interest by a subsequent tax sale of the property, where the adverse holders' ownership interest was premised on the mistaken, albeit reasonable and good faith, belief that they were paying the proper taxes on the property. [West's A.I.C. 6–1.1–24–1\(a, c\)](#). [Bonnell v. Cotner](#), 50 N.E.3d 361 (Ind. 2016).

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### Footnotes

- <sup>1</sup> [Klaar v. Lemperis](#), 303 S.W.2d 55 (Mo. 1957).
- <sup>2</sup> [Taylor v. Bell](#), 87 So. 3d 1134 (Miss. Ct. App. 2012).  
Title acquired through adverse possession cannot be divested by acts other than those required to transfer a title acquired by deed. [Gorman v. City of Woodinville](#), 175 Wash. 2d 68, 283 P.3d 1082 (2012).
- <sup>3</sup> [Crowden v. Grantland](#), 510 So. 2d 238 (Ala. 1987).
- <sup>4</sup> [Jordan v. Fountain](#), 986 So. 2d 1018 (Miss. Ct. App. 2008).
- <sup>5</sup> [Hallowell v. Borchers](#), 150 Neb. 322, 34 N.W.2d 404 (1948).
- <sup>6</sup> [Able v. Lawson](#), 523 So. 2d 395 (Ala. 1988); [Brewer v. Brewer](#), 238 N.C. 607, 78 S.E.2d 719, 40 A.L.R.2d 763 (1953).
- <sup>7</sup> [Schultz v. Dew](#), 1997 SD 72, 564 N.W.2d 320 (S.D. 1997).
- <sup>8</sup> [Crowden v. Grantland](#), 510 So. 2d 238 (Ala. 1987).
- <sup>9</sup> [Marvel v. Barley Mill Road Homes](#), 34 Del. Ch. 417, 104 A.2d 908 (1954); [Creel v. Hammans](#), 234 Iowa 532, 13 N.W.2d 305 (1944); [Fredericksen v. Henke](#), 167 Minn. 356, 209 N.W. 257, 46 A.L.R. 785 (1926).
- <sup>10</sup> [Major v. Meyers](#), 111 S.W.2d 1184 (Tex. Civ. App. El Paso 1937).
- <sup>11</sup> [Strong v. Baldwin](#), 154 Cal. 150, 97 P. 178 (1908); [Oahu Railway & Land Co. v. Kaili](#), 22 Haw. 673, 1915 WL 1423 (1915); [Cassidy v. Lenahan](#), 294 Ill. 503, 128 N.E. 544 (1920); [Maloney v. Bedford](#), 290 Ky. 647, 162 S.W.2d 198 (1942); [Martin v. Martin](#), 76 Neb. 335, 107 N.W. 580 (1906).
- <sup>12</sup> [Oahu Railway & Land Co. v. Kaili](#), 22 Haw. 673, 1915 WL 1423 (1915); [Thibault v. Flynn](#), 133 Mont. 461, 325 P.2d 914 (1958).
- <sup>13</sup> [Krause v. Nolte](#), 217 Ill. 298, 75 N.E. 362 (1905) (holding that a survey establishes only the line, not title); [Peterson v. Hollis](#), 90 Kan. 655, 136 P. 258 (1913).
- <sup>14</sup> [Crone v. Nuss](#), 46 Kan. App. 2d 436, 263 P.3d 809 (2011), review denied, (June 13, 2012).  
As to quiet title actions, generally, see [Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.](#)

### 3 Am. Jur. 2d Adverse Possession § 239

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### a. Nature of Title Generally

## § 239. Relation back; liability to record owner

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(1)

It is a general theory underlying adverse possession that the title, once matured, relates back to the beginning of the adverse holding.<sup>1</sup> Under such theory, it is presumed that the origin of the title was rightful, not wrongful; that the possession which has matured it was in support, not in derogation, of the rightful title; and that the claimant, who by a possession pursuant to law has matured a title, has been the owner of the title from the beginning.<sup>2</sup> After the title has matured, the former owner of the land cannot call the adverse possession owner to account for any actions done to the land in the course of the possession that has ripened such party's right and title to it.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Wanha v. Long](#), 255 Neb. 849, 587 N.W.2d 531 (1998).

<sup>2</sup> [Counce v. Yount-Lee Oil Co.](#), 87 F.2d 572 (C.C.A. 5th Cir. 1937); [Suplee v. Eckert](#), 38 Del. Ch. 359, 152 A.2d 289 (1959); [Oahu Railway & Land Co. v. Kaili](#), 22 Haw. 673, 1915 WL 1423 (1915); [Davis v. Haines](#), 349 Ill. 622, 182 N.E. 718 (1932); [Lagonda Nat. Bank of Springfield v. Robnett](#), 77 Ohio L. Abs. 1, 77 Ohio L. Abs. 3, 147 N.E.2d 637 (Ct. App. 2d Dist. Clark County 1957).

<sup>3</sup> [Counce v. Yount-Lee Oil Co.](#), 87 F.2d 572 (C.C.A. 5th Cir. 1937).





### 3 Am. Jur. 2d Adverse Possession § 240

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#### Adverse Possession

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### b. Particular Aspects Affecting Title

## § 240. Aggressive use of title acquired adversely

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(5)

The statute on adverse possession confers a title which can be enforced by suit and is not merely a defensive statute. However, one claiming ownership of land by adverse possession must rely on the strength of the title by adverse possession and not on any possible weakness in the interest or title of the adversary.<sup>2</sup>

Title gained by adverse possession may be used by the adverse possessor either as a weapon or as a shield as necessities may demand.<sup>3</sup> Thus, adverse possession and the operation of the statute of limitations will create a title which can be used offensively or defensively,<sup>4</sup> and one seeking to acquire title under a statute of limitations is not required to institute suit against anyone but is not prohibited from doing so.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Worthen v. Rushing](#), 228 Ark. 445, 307 S.W.2d 890 (1957).

<sup>2</sup> [Maas v. Platte Val. Public Power and Irr. Dist.](#), 167 Neb. 124, 91 N.W.2d 409 (1958); [Ohm v. Clear Creek Drainage Dist.](#), 153 Neb. 428, 45 N.W.2d 117 (1950).  
As to the adverse claimant's right to challenge the tax deed, see § 233.

<sup>3</sup> [Jasperson v. Scharnikow](#), 150 F. 571 (C.C.A. 9th Cir. 1907); [Hart v. Sternberg](#), 205 Ark. 929, 171 S.W.2d 475 (1943); [Lomas v. Webster](#), 109 Colo. 107, 122 P.2d 248 (1942); [Kurz v. Blume](#), 407 Ill. 383, 95 N.E.2d 338, 25 A.L.R.2d 1258 (1950); [Scottish Am. Mortg. Co. v. Butler](#), 99 Miss. 56, 54 So. 666 (1911); [McGowan v. Carlton](#), 1930 OK 227, 143 Okla. 106, 288 P. 338 (1930); [Stolfa v. Gaines](#), 1929 OK 487, 140 Okla. 292, 283 P. 563 (1929).

<sup>4</sup> [Freemon v. Funk, 85 Kan. 473, 117 P. 1024 \(1911\).](#)  
As to the defensive use of title by adverse possession, see [§ 284](#).

<sup>5</sup> [Gibbs v. Lester, 41 S.W.2d 28, 80 A.L.R. 431 \(Tex. Comm'n App. 1931\).](#)

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### 3 Am. Jur. 2d Adverse Possession § 241

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### b. Particular Aspects Affecting Title

## § 241. Defensive use of title acquired adversely

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(1)

Title acquired by adverse possession, being the equivalent of title acquired by purchase and conveyance,<sup>1</sup> is a bar to recovery of the property by the former owner and is in every respect as good for purposes of defense as a title by deeds running back to the government.<sup>2</sup> Title by adverse possession will be effective as a defense to a bill in equity for the removal of a cloud from the title.<sup>3</sup>

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#### Footnotes

<sup>1</sup> § 238.

<sup>2</sup> [King v. Fasching](#), 234 S.W.2d 549 (Mo. 1950).

<sup>3</sup> [Logan's Heirs v. Ward](#), 58 W. Va. 366, 52 S.E. 398 (1905).  
As to quieting title in the defendant, see [Am. Jur. 2d, Quieting Title and Determination of Adverse Claims § 58](#).

### 3 Am. Jur. 2d Adverse Possession § 242

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#### Adverse Possession

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### b. Particular Aspects Affecting Title

## § 242. Effect on boundaries

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  108

Where title is acquired and perfected by adverse possession, the boundaries thereby established become the proper boundaries irrespective of the operation of the principles which would otherwise fix and determine their location.<sup>1</sup> Thus, once title to land is acquired by adverse possession, by owners of adjoining property who erect a fence under a mistaken belief that their land extends thereto, it is not necessary for the adverse possessors to keep up the fence thereafter.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Krause v. Nolte](#), 217 Ill. 298, 75 N.E. 362 (1905).  
As to the fixation of boundary lines, generally, see [Am. Jur. 2d, Boundaries §§ 1 et seq.](#)

<sup>2</sup> [Norgard v. Busher](#), 220 Or. 297, 349 P.2d 490, 80 A.L.R.2d 1161 (1960).

### 3 Am. Jur. 2d Adverse Possession § 243

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#### Adverse Possession

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### b. Particular Aspects Affecting Title

## § 243. Effect of recording statutes; protection against purchasers from record owner

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#) 🔑 106(1)

Generally, a conveyance by the holder of the apparent record title is ineffective as against a title previously acquired by adverse possession.<sup>1</sup> Adverse possession statutes do not require that the written instrument upon which an adverse possession claim is grounded be recorded in order to provide notice of the adverse possession to the true owner.<sup>2</sup> Title by adverse possession is not affected by recording statutes, meaning that an adverse title once obtained is good even as against those holding a title recorded as provided by statute, or a title derived from a recorded title, whether or not the adverse holder continued in actual possession after having perfected title by adverse possession.<sup>3</sup> Further, under a statute providing for the recording of conveyances, the provision that an unrecorded conveyance is void as against a bona fide purchaser whose conveyance is first recorded does not make a conveyance of the record title to a bona fide purchaser effective to extinguish a title acquired by adverse possession.<sup>4</sup> Thus, a title by adverse possession may be good as against a recorded quitclaim deed from the former owner to a third person even though the adverse titleholder has entered into possession under deeds not recorded before the quitclaim deed and even though the grantee in the latter has no actual notice of the unrecorded deeds.<sup>5</sup> However, in some jurisdictions, one who for value purchases the record title without notice actual or constructive of any equity or adverse claim therein may be protected.<sup>6</sup>

It devolves on a purchaser from the record owner to ascertain whether there has been adverse possession of the property hostile to the record title.<sup>7</sup> One cannot be an innocent purchaser against a title acquired by adverse possession<sup>8</sup> because one who has acquired title by adverse possession is not required to proclaim it publicly.<sup>9</sup> The principle that a public proclamation of a claim of title by adverse possession is not necessary to protect the title so acquired, even as against a bona fide purchaser from the former owner, applies whether the adverse titleholder is in actual possession of the property at the time of the conveyance<sup>10</sup> or is not in actual possession of the property at the time of the conveyance by the record owner and even though the grantee of the record owner has no notice of the adverse holder's title.<sup>11</sup>

Footnotes

- <sup>1</sup> Sisson v. Swift, 243 Ala. 289, 9 So. 2d 891 (1942).
- <sup>2</sup> Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 Mont. 329, 27 P.3d 429 (2001).
- <sup>3</sup> Fairley v. Howell, 159 Miss. 668, 131 So. 109 (1930); Roysdon v. Terry, 4 Tenn. App. 638, 1927 WL 2096 (1927); Kinney v. Johnson, 135 S.W.2d 773 (Tex. Civ. App. El Paso 1939), writ dismissed, judgment correct; Mugaas v. Smith, 33 Wash. 2d 429, 206 P.2d 332, 9 A.L.R.2d 846 (1949).
- <sup>4</sup> Mugaas v. Smith, 33 Wash. 2d 429, 206 P.2d 332, 9 A.L.R.2d 846 (1949).
- <sup>5</sup> King v. Fasching, 234 S.W.2d 549 (Mo. 1950).
- <sup>6</sup> Ricks v. Batchelor, 225 N.C. 8, 33 S.E.2d 68 (1945).
- <sup>7</sup> Lowi v. David, 134 Miss. 296, 98 So. 684 (1924).
- <sup>8</sup> Marshburn v. Stewart, 295 S.W. 679 (Tex. Civ. App. Beaumont 1927), writ dismissed w.o.j., (Oct. 26, 1927).
- <sup>9</sup> Yatzak v. Cloon, 313 Mich. 584, 22 N.W.2d 112 (1946); Lowi v. David, 134 Miss. 296, 98 So. 684 (1924); Marshburn v. Stewart, 295 S.W. 679 (Tex. Civ. App. Beaumont 1927), writ dismissed w.o.j., (Oct. 26, 1927); Mugaas v. Smith, 33 Wash. 2d 429, 206 P.2d 332, 9 A.L.R.2d 846 (1949).
- <sup>10</sup> Yatzak v. Cloon, 313 Mich. 584, 22 N.W.2d 112 (1946).
- <sup>11</sup> Lowi v. David, 134 Miss. 296, 98 So. 684 (1924); Marshburn v. Stewart, 295 S.W. 679 (Tex. Civ. App. Beaumont 1927), writ dismissed w.o.j., (Oct. 26, 1927); Mugaas v. Smith, 33 Wash. 2d 429, 206 P.2d 332, 9 A.L.R.2d 846 (1949).

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### 3 Am. Jur. 2d Adverse Possession § 244

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#### Adverse Possession

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#### IV. Operation and Effect

##### A. Overview; Title or Right Acquired

##### 2. After Expiration of Statutory Period

##### b. Particular Aspects Affecting Title

## § 244. Registration of title; establishment of record title

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  106(1)

A title acquired by adverse possession may be registered because, for purposes of registration, a title by adverse possession cannot be distinguished from title by grant.<sup>1</sup> However, the title acquired by adverse possession is not a record title unless it is made so.<sup>2</sup>

Establishing title by adverse possession as a record title is held to require evidence showing the presence of all elements necessary to make out a title by adverse possession; and it is said that this can be done only in a judicial proceeding to which the persons to be bound by the judgment have been made parties. Ex parte affidavits filed in the recorder's office without sanction of law do not establish a record title to land acquired by adverse possession.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Keith v. Kennard](#), 222 Mass. 398, 110 N.E. 1030 (1916).  
As to the registration of a title, see [Am. Jur. 2d, Registration of Land Titles §§ 1 et seq.](#)

<sup>2</sup> [Horton v. Matheny](#), 72 Ohio App. 187, 27 Ohio Op. 69, 51 N.E.2d 41 (6th Dist. Williams County 1943).  
As to recording of instruments relating to real property, generally, see [Am. Jur. 2d, Records and Recording Laws §§ 39 to 156.](#)

<sup>3</sup> [Horton v. Matheny](#), 72 Ohio App. 187, 27 Ohio Op. 69, 51 N.E.2d 41 (6th Dist. Williams County 1943).  
As to evidence at trial on an adverse claim, see §§ [285](#) to [297](#).



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### 3 Am. Jur. 2d Adverse Possession IV B Refs.

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#### IV. Operation and Effect

##### B. Effect Based on Nature or Extent of Possession

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#) 🔑 96 to 101, 103

#### A.L.R. Library

A.L.R. Index, Adverse Possession

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### 3 Am. Jur. 2d Adverse Possession § 245

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#### IV. Operation and Effect


##### B. Effect Based on Nature or Extent of Possession

##### 1. In General

## § 245. Extent of actual possession

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  96

The extent of an adverse claimant's possession is determinative of the boundaries of the land acquired.<sup>1</sup>For example, where a landowner is under a belief that he or she owns certain lands enclosed with the landowner's own lands and he or she exercises dominion over a portion of the enclosed lands adversely to the record owner for the required statutory period of time, such constitutes an investiture of title to the entire tract.<sup>2</sup>However, the extent of possession required under color of title differs from that required where there is no color of title. A possession with color of title generally may ripen into title not only to the land actually occupied but also to all land described in the color of title document whereas a possession without color of title will not ripen into title to more property than is actually possessed.<sup>3</sup>If a claimant enters on land under color of title, the title shows what the claimant intends to seize. A claimant who enters without color of title must give some indication of the extent of the intended seizure<sup>4</sup>although, under certain circumstances, an adverse possessor's occupancy of a portion of a unitary tract of land may constructively extend to the entire tract.<sup>5</sup>In either case, the essential elements of adverse possession remain the same.<sup>6</sup>

The rule that adverse possession of land cannot be extended beyond the calls of the deed applies only to constructive and not actual possession; thus, if land is actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed but to the fact itself and its hostile character.<sup>7</sup>

#### Observation:

It is not necessary that a party asserting an adverse possession claim prove a complete enclosure or that he or she remain continuously on the land for the statutory period but only that the land be used continuously for the purposes to which it was by its nature adapted.<sup>8</sup>

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Footnotes

- <sup>1</sup> Friendship Baptist Church, Inc. v. West, 265 Ga. 745, 462 S.E.2d 618 (1995); Culton v. Simpson, 265 Ky. 343, 96 S.W.2d 856 (1936); Georgia-Carolina Land & Timber Co. v. Potter, 189 N.C. 56, 127 S.E. 343 (1925); N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 736 A.2d 780 (1999).
- <sup>2</sup> Steele v. Blankenship, 2010 Ark. App. 86, 377 S.W.3d 293 (2010).
- <sup>3</sup> Petrus v. Nature Conservancy, 330 Ark. 722, 957 S.W.2d 688 (1997); McBeth v. Wetnight, 57 Ind. App. 47, 106 N.E. 407 (1914); Page v. O'Neal, 207 Miss. 350, 42 So. 2d 391 (1949); Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 559 A.2d 1068 (1989).  
As to the nature and extent of possession under color of title, see §§ 247 to 252.  
As to color of title, generally, see §§ 111 to 133.  
As to actual possession as a required element of adverse possession, see §§ 15 to 21.
- <sup>4</sup> Culton v. Simpson, 265 Ky. 343, 96 S.W.2d 856 (1936); Georgia-Carolina Land & Timber Co. v. Potter, 189 N.C. 56, 127 S.E. 343 (1925).
- <sup>5</sup> Striefel v. Charles-Keyt-Leaman Partnership, 1999 ME 111, 733 A.2d 984 (Me. 1999).
- <sup>6</sup> McBeth v. Wetnight, 57 Ind. App. 47, 106 N.E. 407 (1914); Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N.W. 855 (1901).
- <sup>7</sup> Frank v. Smith, 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 458 (1940).
- <sup>8</sup> Wanha v. Long, 255 Neb. 849, 587 N.W.2d 531 (1998).  
As to the continuity of possession required to establish adverse possession, see §§ 67 to 69.

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### 3 Am. Jur. 2d Adverse Possession § 246

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#### Adverse Possession

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#### IV. Operation and Effect


##### B. Effect Based on Nature or Extent of Possession

##### 1. In General

## § 246. Possession under claim of right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  98

#### A.L.R. Library

[Adverse possession under parol gift of land, 43 A.L.R.2d 6](#)

As a general rule, in the absence of color of title, the adverse possession of one who claims title in that manner extends only to such part of the land as the claimant has actually occupied and possessed continuously and uninterruptedly during the statutory period.<sup>1</sup> The rights of those who enter on lands without color of title are ordinarily confined to that portion of the property that was subjected to their actual possession.<sup>2</sup>

In cases without color of title, there can be no constructive possession by the claimant<sup>3</sup> although in at least one jurisdiction, pursuant to the particular statute applicable, possession may be construed to include the entirety of a tract that is enclosed.<sup>4</sup>

A grantee who undertakes to claim by adverse possession real estate that is outside the clearly defined boundaries of the property conveyed to the grantee must enter thereon and claim to own the same adversely to the true owner.<sup>5</sup> A deed that describes part of a tract does not constitute color of title to the part of the tract not described so as to establish constructive adverse possession to the whole from the possession of part.<sup>6</sup> A deed that is void due to the uncertain and indefinite description of the land conveyed does not constitute color of title, and possession under it is limited to “possessio pedis.”<sup>7</sup>

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#### Footnotes

- <sup>1</sup> Baudin v. Charrier, 137 So. 2d 440 (La. Ct. App. 3d Cir. 1962); Ennis v. Stanley, 346 Mich. 296, 78 N.W.2d 114 (1956); Hamburg Realty Co. v. Woods, 327 S.W.2d 138 (Mo. 1959).  
As to actual possession required as an element of adverse possession, see §§ 15 to 21.
- <sup>2</sup> Tennessee Coal, Iron & R. Co. v. Brewer, 92 F.2d 804 (C.C.A. 5th Cir. 1937); Turnipseed v. Moseley, 248 Ala. 340, 27 So. 2d 483, 170 A.L.R. 882 (1946); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); McCurdy v. Rich, 76 Ind. App. 469, 132 N.E. 315 (1921); Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S.W. 130 (1916); Page v. O'Neal, 207 Miss. 350, 42 So. 2d 391 (1949); Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952); Powers v. Malavazos, 25 Ohio App. 450, 6 Ohio L. Abs. 62, 158 N.E. 654 (4th Dist. Scioto County 1927); Bender v. Brooks, 103 Tex. 329, 127 S.W. 168 (1910); Slater v. Murphy, 55 Wash. 2d 892, 339 P.2d 457 (1959), opinion adhered to on reh'g, 55 Wash. 2d 892, 351 P.2d 515 (1960).
- <sup>3</sup> Cooper v. Tarpley, 112 Ind. App. 1, 41 N.E.2d 640 (1942); Holcomb v. Swift Coal & Timber Co., 251 Ky. 642, 65 S.W.2d 741 (1933); Morrison v. Linn, 50 Mont. 396, 147 P. 166 (1915).
- <sup>4</sup> W. T. Carter & Bro. v. Wells, 130 Tex. 189, 106 S.W.2d 1050, 115 A.L.R. 1293 (Comm'n App. 1937).
- <sup>5</sup> Ames v. Brooks, 179 Kan. 590, 297 P.2d 195 (1956).
- <sup>6</sup> Johns v. Scobie, 12 Cal. 2d 618, 86 P.2d 820, 121 A.L.R. 1404 (1939).
- <sup>7</sup> Mitchell v. Moore, 152 Fla. 843, 13 So. 2d 314 (1943).  
As to what constitutes color of title, see § 118.

### 3 Am. Jur. 2d Adverse Possession § 247

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#### IV. Operation and Effect

##### B. Effect Based on Nature or Extent of Possession

##### 2. Possession Under Color of Title

## § 247. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  99.1, 100

The function of the doctrine of color of title is to define the exact boundaries of the land claimed.<sup>1</sup> That is, the object of color of title is not to pass title but to define the extent of the claim and extend the possession beyond the actual occupancy to the whole property described in the instrument.<sup>2</sup> One who enters on land under color of title, such as a deed, and possesses only a part of the land will be deemed to have possession of the entire tract to the limits of the boundaries described in the color of title for purposes of adverse possession.<sup>3</sup>

The constructive seisin of a grantee under a deed is the equivalent of actual seisin.<sup>4</sup> In other words, one who enters on land under color of title is presumed to have entered in accordance therewith; therefore, actual possession of a portion of the property will, by presumption of law, be constructively extended to the boundaries defined by the color of title except insofar as the land so included is in the adverse possession of another.<sup>5</sup>

When one adversely possesses land under color of title, the extent of the land possessed is measured by the terms of the purported instrument giving color of title rather than by the actual physical use by the claimant.<sup>6</sup> Another effect of the doctrine is to shorten the period of prescription.<sup>7</sup>

Actual possession under color of title is sufficient to put on inquiry, to the extent of such color of title, anyone claiming or seeking an interest in the land.<sup>8</sup> Even though the deed or title is void, the true owner will be deemed disseised to the extent of the boundaries of such deed or title by the possession of an adverse claimant of a part of the premises under such deed or title.<sup>9</sup> Beyond such boundaries, however, the claimant's possession will not be extended by construction,<sup>10</sup> and in claiming title to property by asserting adverse possession under color of title, the claimant's color of title is limited to property shown in the public records and does not extend from that ownership to the claimant's neighbor's contiguous land.<sup>11</sup>

Even under a color-of-title claim, however, the adverse possession claimant cannot adversely possess the disputed property without having been in actual possession of some portion thereof.<sup>12</sup> That is, color of title, without adverse possession

thereunder, does not operate to give constructive possession. It amounts to nothing unless connected with an adverse possession. While color of title imparts constructive possession of the whole premises from the actual possession of a part only and is evidence of the nature of the entry and of the extent and boundaries of the possession claimed, it is not of itself evidence of adverse possession, and it does not necessarily follow that adverse possession can be proved by less evidence when the entry is under color of title than when it is not.<sup>13</sup>

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## Footnotes

- <sup>1</sup> Lott v. Muldoon Road Baptist Church, Inc., 466 P.2d 815 (Alaska 1970).
- <sup>2</sup> Fore v. Berry, 94 S.C. 71, 78 S.E. 706 (1913).
- <sup>3</sup> U S v. Algodones Land Co, 52 F.2d 359 (C.C.A. 10th Cir. 1931); Liberty Coal & Coke Co. v. Lewis, 52 F.2d 655 (E.D. Ky. 1931); Hackman v. Maund, 443 So. 2d 899 (Ala. 1983); Long v. Ladd, 273 Ala. 410, 142 So. 2d 660 (1962); Penland v. Johnston, 97 Ark. App. 11, 242 S.W.3d 635 (2006); Wheatley v. San Pedro, L.A. & S.L.R. Co., 169 Cal. 505, 147 P. 135 (1915); Chaney v. State Mineral Bd., 444 So. 2d 105 (La. 1983); Agurs v. Holt, 232 La. 1026, 95 So. 2d 644 (1957); Wentworth v. Forne, 242 Miss. 883, 137 So. 2d 166 (1962); Woodside v. Durham, 317 Mo. 15, 295 S.W. 772, 53 A.L.R. 884 (1927); Chapin v. Letcher, 93 N.W.2d 415 (N.D. 1958); Sioux City Boat Club v. Mulhall, 79 S.D. 668, 117 N.W.2d 92 (1962); Lambright v. Trahan, 322 S.W.3d 424 (Tex. App. Texarkana 2010), review denied, (Jan. 7, 2011); In re Estates of Allen, 190 Vt. 301, 2011 VT 95, 30 A.3d 662 (2011); Smith v. Pittston Co., 203 Va. 408, 124 S.E.2d 1 (1962).  
As to adverse possession pursuant to color of title, generally, see §§ 111 to 123.  
As to actual possession as a required element of adverse possession, see §§ 15 to 21.
- <sup>4</sup> McRae v. Ketchum, 138 Fla. 610, 189 So. 853 (1939); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955).
- <sup>5</sup> State of Mich. v. State of Wis., 270 U.S. 295, 46 S. Ct. 290, 70 L. Ed. 595 (1926); Long v. Ladd, 273 Ala. 410, 142 So. 2d 660 (1962); Hart v. Sternberg, 205 Ark. 929, 171 S.W.2d 475 (1943); McRae v. Ketchum, 138 Fla. 610, 189 So. 853 (1939); Roberson v. Downing Co., 120 Ga. 833, 48 S.E. 429 (1904); Howard v. Twibell, 179 Ind. 67, 100 N.E. 372 (1913); Ford Motor Co. v. Collett, 303 S.W.2d 553 (Ky. 1957); Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S.W. 130 (1916); Hornblower v. Banton, 103 Me. 375, 69 A. 568 (1907); Spicer v. Gore, 219 Md. 469, 150 A.2d 226 (1959); Monroe v. Rawlings, 331 Mich. 49, 49 N.W.2d 55 (1951); Seals v. Williams, 80 Miss. 234, 31 So. 707 (1902); Willis v. Johns, 55 N.C. App. 621, 286 S.E.2d 646 (1982); Powers v. Malavazos, 25 Ohio App. 450, 6 Ohio L. Abs. 62, 158 N.E. 654 (4th Dist. Scioto County 1927); Weston v. Morgan, 162 S.C. 177, 160 S.E. 436 (1931); Sioux City Boat Club v. Mulhall, 79 S.D. 668, 117 N.W.2d 92 (1962); Lieberman, Loveman & O'Brien v. Clark, 114 Tenn. 117, 85 S.W. 258 (1905); Chittim v. Auld, 219 S.W.2d 702 (Tex. Civ. App. San Antonio 1949), writ refused n.r.e.; Welner v. Stearns, 40 Utah 185, 120 P. 490 (1911); Gauley Coal Land Co. v. O'Dell, 144 W. Va. 730, 110 S.E.2d 833 (1959).
- <sup>6</sup> Tenala, Ltd. v. Fowler, 921 P.2d 1114 (Alaska 1996).
- <sup>7</sup> Lott v. Muldoon Road Baptist Church, Inc., 466 P.2d 815 (Alaska 1970).
- <sup>8</sup> Goen v. Sansbury, 219 Md. 289, 149 A.2d 17 (1959) (notice of claim limited to the extent of the claimant's actual occupancy); Tarnovsky v. Security State Bank of Killedeer, 77 N.W.2d 828 (N.D. 1956).  
As to notice or knowledge, generally, see § 57.
- <sup>9</sup> Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944).
- <sup>10</sup> U S v. Algodones Land Co, 52 F.2d 359 (C.C.A. 10th Cir. 1931); Rust Land & Lumber Co. v. Isom, 70 Ark. 99, 66 S.W. 434 (1902); McRae v. Ketchum, 138 Fla. 610, 189 So. 853 (1939); McBeth v. Wetnight, 57 Ind. App. 47, 106 N.E. 407 (1914); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955); Pritchard v. Lewis, 125 Wis. 604, 104 N.W. 989 (1905).
- <sup>11</sup> Lawson v. Murray, 365 So. 2d 744 (Fla. 1st DCA 1978).
- <sup>12</sup> Jonkers v. Summit Twp., 278 Mich. App. 263, 747 N.W.2d 901 (2008).



- <sup>13</sup> French v. Hillman, 216 F. Supp. 117 (W.D. Va. 1963), judgment aff'd, 331 F.2d 305 (4th Cir. 1964); Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co., 162 Ala. 151, 50 So. 230 (1909); Birchfield v. Thiercof, 5 Ariz. App. 484, 428 P.2d 148 (1967); Richbourg v. Rose, 53 Fla. 173, 44 So. 69 (1907); McBeth v. Wetnight, 57 Ind. App. 47, 106 N.E. 407 (1914); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955); Grandin v. Gardiner, 63 N.W.2d 128 (N.D. 1954).  
As to the nature of a claim to property predicated on color of title, see §§ 93, 98.

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#### Adverse Possession

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#### IV. Operation and Effect

##### B. Effect Based on Nature or Extent of Possession

##### 2. Possession Under Color of Title

## § 248. Several contiguous tracts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  101

Generally, the doctrine that the actual possession of a part of the premises will be constructively extended to all land described in the color of title relates only to an entire tract; constructive possession can extend only to the whole of that which is partially occupied.<sup>1</sup> Constructive possession generally does not extend to parcels other and distinct from those partially occupied even though they are contiguous<sup>2</sup> and were conveyed to the claimant by the same person and at one time.<sup>3</sup>

Where, however, a claimant has actual possession of land conveyed by a deed containing two tracts, one of which was wrongly conveyed by the grantor, the claimant can obtain possession to both tracts if they are contiguous.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Andrus v. Hutchinson](#), 17 F.2d 472 (C.C.A. 5th Cir. 1927); [Gracy v. Fielding](#), 71 Fla. 1, 70 So. 625 (1916); [Elliott v. Hensley](#), 188 Ky. 444, 222 S.W. 507 (1920); [Hornblower v. Banton](#), 103 Me. 375, 69 A. 568 (1907); [John L. Roper Lumber Co. v. Richmond Cedar Works](#), 168 N.C. 344, 84 S.E. 523 (1915).

As to the effect of possession under color of title, generally, see § 247.

As to adverse possession pursuant to color of title, generally, see §§ 111 to 133.

<sup>2</sup> [Andrus v. Hutchinson](#), 17 F.2d 472 (C.C.A. 5th Cir. 1927); [Gracy v. Fielding](#), 71 Fla. 1, 70 So. 625 (1916); [Elliott v. Hensley](#), 188 Ky. 444, 222 S.W. 507 (1920); [John L. Roper Lumber Co. v. Richmond Cedar Works](#), 168 N.C. 344, 84 S.E. 523 (1915).

As to the nature of a claim to property predicated on color of title, see §§ 93, 98.

<sup>3</sup> [Andrus v. Hutchinson](#), 17 F.2d 472 (C.C.A. 5th Cir. 1927); [Gracy v. Fielding](#), 71 Fla. 1, 70 So. 625 (1916); [Elliott v. Hensley](#), 188 Ky. 444, 222 S.W. 507 (1920); [Hornblower v. Banton](#), 103 Me. 375, 69 A. 568 (1907); [Bowers v.](#)

Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

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Gutierrez v. People's Management of Texas I, Ltd., 277 S.W.3d 72 (Tex. App. El Paso 2009).

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#### IV. Operation and Effect

##### B. Effect Based on Nature or Extent of Possession

##### 2. Possession Under Color of Title

## § 249. Tracts separately owned

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  99.1

The rule that a claimant's actual possession is constructively extended to the limits of such claimant's color of title is not applicable to land separately owned, which is to say that constructive possession under color of title does not extend to land embraced in such color of title where the land is owned by a person other than the owner of the tract partially occupied by the adverse claimant.<sup>1</sup> Thus, where an occupant's boundary covers adjoining lands of separate owners, his or her possession of the land of one will not, on the theory of constructive possession, be deemed adverse possession of the land of the other.<sup>2</sup> Also, where a deed is void as to a part of the land conveyed, and the grantee occupies a portion of that to which he actually has title, such fact does not give him constructive possession of the part to which he has no title so as to dispossess the real owner.<sup>3</sup>

The rule that governs where the tracts are separately owned is both practical and just, for otherwise, the owner of land would be compelled to seek out and examine the color of title held by every newcomer taking possession of other land in the vicinity, lest the latter's actual possession be constructively extended to destroy the former's title.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [McCoy v. Anthony Land Co.](#), 230 Ark. 244, 322 S.W.2d 439 (1959).  
As to the effect of possession under color of title, generally, see [§ 247](#).  
As to what constitutes adverse possession pursuant to color of title, generally, see [§§ 111 to 133](#).
- <sup>2</sup> [United Fuel Gas Co. v. Dyer](#), 185 F.2d 99 (4th Cir. 1950).
- <sup>3</sup> [Wentworth v. Forne](#), 242 Miss. 883, 137 So. 2d 166 (1962).
- <sup>4</sup> [McCoy v. Anthony Land Co.](#), 230 Ark. 244, 322 S.W.2d 439 (1959).

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#### IV. Operation and Effect


##### B. Effect Based on Nature or Extent of Possession

##### 2. Possession Under Color of Title

## § 250. Tract erroneously included in deed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  99.1

The presumption that a person who has a title and possession conformable to it possesses according to the title and to the full extent of its boundaries does not apply to land erroneously included in the deed where the grantee did not possess or intend to possess such land.<sup>1</sup> Thus, where it is shown that a purchaser did not intend to buy or possess certain property described in the deed, there is no basis for a conclusion that the purchaser possessed it conformably to the title, and if it were found that the purchaser possessed a part, the presumption it was possessed according to the title is rebutted by the fact that such possession was not intended.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Agurs v. Holt](#), 232 La. 1026, 95 So. 2d 644 (1957).  
As to the effect of possession under color of title, generally, see [§ 247](#).  
As to what constitutes adverse possession pursuant to color of title, generally, see §§ [111](#) to [133](#).

<sup>2</sup> [Agurs v. Holt](#), 232 La. 1026, 95 So. 2d 644 (1957).  
As to actual possession as a required element of adverse possession, see §§ [15](#) to [21](#).  
As to what constitutes hostile possession as an element of adverse possession, see §§ [38](#) to [56](#).

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#### IV. Operation and Effect

##### B. Effect Based on Nature or Extent of Possession

##### 2. Possession Under Color of Title

## § 251. Conflicting grants and claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#) 🔑 103

Constructive possession by virtue of occupancy of certain portions of a tract under color of title cannot prevail against the actual possession of other portions by another.<sup>1</sup> Adjacent owners may be in constructive possession of the same land, being included in the described boundaries of each tract. In such cases, no prescription can arise in favor of either, but the rights of the parties will be determined according to the superiority of the one title or the other aside from such prescription.<sup>2</sup>

Where constructive possession between senior and junior patentees or grantees claiming from a common source clash, the older title generally takes precedence although this rule has no application to one who claims under a senior grant but whose chain of title does not reach back to it.<sup>3</sup> Where title deeds of two rival claimants overlap each other, if both have actual possession of some part of the lappage, the possession of the true owner, by virtue of a superior title, extends to all not actually occupied by the other.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Sacks v. Martin](#), 284 Ga. 712, 670 S.E.2d 417 (2008); [Big Run Coal & Clay Co. v. Helton](#), 323 S.W.2d 855 (Ky. 1959); [Hornblower v. Banton](#), 103 Me. 375, 69 A. 568 (1907); [Smith v. Pittston Co.](#), 203 Va. 408, 124 S.E.2d 1 (1962).

As to the effect of two or more persons in possession of same tract, see [§ 65](#).

As to the effect of possession under color of title, generally, see [§ 247](#).

As to what constitutes adverse possession pursuant to color of title, generally, see [§§ 111 to 133](#).

<sup>2</sup> [Bunger v. Grimm](#), 142 Ga. 448, 83 S.E. 200 (1914).

<sup>3</sup> [Goen v. Sansbury](#), 219 Md. 289, 149 A.2d 17 (1959); [Schmitt v. Traphagen](#), 73 N.J. Eq. 399, 69 A. 189 (Ct. Err. &

App. 1908); *Sledge v. Miller*, 249 N.C. 447, 106 S.E.2d 868 (1959); *Baldwin v. Mothena*, 171 Va. 94, 198 S.E. 569 (1938).

<sup>4</sup> *Vance v. Guy*, 224 N.C. 607, 31 S.E.2d 766 (1944).

As to actual possession as a required element of adverse possession, see §§ 15 to 21.

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#### IV. Operation and Effect

##### B. Effect Based on Nature or Extent of Possession

##### 2. Possession Under Color of Title

## § 252. Owner in possession of part

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  101

The doctrine of constructive possession by color of title does not apply against a person having legal title and in peaceable and actual possession of the land in dispute.<sup>1</sup> A record owner who is in actual possession of a part of the premises is in a constructive possession of all of the land not actually possessed by another claiming under color of title<sup>2</sup> even though the owner's actual possession is not within the limits of the land claimed by the other.<sup>3</sup>

#### Observation:

In a claim for adverse possession, possession must be exclusive, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession.<sup>4</sup>

Because both parties cannot be seised at the same time of the same land under different titles, the law adjudges the seisin of all property that is not in the actual occupancy of the adverse party to be in the one who has the better title.<sup>5</sup> In the case of a mixed or common possession by the legal owner and another, the law adjudges the rightful possession in the former, and the latter's possession cannot ripen into title.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [Chittim v. Auld](#), 219 S.W.2d 702 (Tex. Civ. App. San Antonio 1949), writ refused n.r.e.

As to the effect of possession under color of title, generally, see § 247.

As to what constitutes adverse possession pursuant to color of title, generally, see §§ 111 to 133.

<sup>2</sup> [Acosta v. Nunez](#), 5 So. 2d 574 (La. Ct. App., Orleans 1942), decree aff'd by, 203 La. 275, 13 So. 2d 860 (1943); [Goen v. Sansbury](#), 219 Md. 289, 149 A.2d 17 (1959); [Wentworth v. Forne](#), 242 Miss. 883, 137 So. 2d 166 (1962); [Vance v. Guy](#), 224 N.C. 607, 31 S.E.2d 766 (1944).

<sup>3</sup> [Goen v. Sansbury](#), 219 Md. 289, 149 A.2d 17 (1959).

<sup>4</sup> [Wanha v. Long](#), 255 Neb. 849, 587 N.W.2d 531 (1998).

As to what constitutes hostile possession as an element of adverse possession, see §§ 38 to 56.

<sup>5</sup> [Goen v. Sansbury](#), 219 Md. 289, 149 A.2d 17 (1959).

<sup>6</sup> [Vider v. Zavislan](#), 146 Colo. 519, 362 P.2d 163 (1961).

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#### V. Particular Properties and Estates Affected

##### A. In General

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#### V. Particular Properties and Estates Affected

##### A. In General

## § 253. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 6

Generally, adverse possession for the prescribed period of time will be effective as against any property not exempt from the statute of limitations governing periods of adverse possession, that is, except property such as that owned by the federal government, public lands generally in most jurisdictions, and certain other properties imbued with a public interest, such as railroad property in many jurisdictions.<sup>1</sup> So long as incidents of adverse possession are complied with, platted land is no less subject to adverse possession than unplatted land.<sup>2</sup> Adverse possession may be established as against a nonpublic entity fee owner despite the existence of easements, including public easements to a county or state.<sup>3</sup> While an individual cannot adversely possess a public way, when streets are laid out on a plat but are not so used by the public, they are nothing more than private ways and may be adversely possessed.<sup>4</sup>

In some jurisdictions, adverse possession may not generally run against lands appropriated to pious or charitable use,<sup>5</sup> and particular exemptions may be established by statute,<sup>6</sup> such as particular lands governed by statutory provisions protecting native claims.<sup>7</sup>

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#### Footnotes

<sup>1</sup> [Illinois Steel Co. v. Bilot](#), 109 Wis. 418, 85 N.W. 402 (1901).  
As to property owned by the federal government, see [§ 257](#).  
As to public property, generally, see [§§ 258 to 263](#).  
As to railroad property, see [§ 265](#).

<sup>2</sup> [Wanha v. Long](#), 255 Neb. 849, 587 N.W.2d 531 (1998).

<sup>3</sup> [Chevy Chase Land Co. of Montgomery County, Md. v. U.S.](#), 37 Fed. Cl. 545 (1997), judgment aff'd, 230 F.3d 1375 (Fed. Cir. 1999), amended, (Mar. 27, 2000) (applying Maryland law).

<sup>4</sup>            [Wanha v. Long](#), 255 Neb. 849, 587 N.W.2d 531 (1998).  
As to highways and streets in particular, see § 261.

<sup>5</sup>            [Billings v. Paine](#), 319 S.W.2d 653 (Mo. 1959).

<sup>6</sup>            [Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel](#), 830 F.2d 374 (D.C. Cir. 1987); [Snook v. Bowers](#), 12 P.3d 771 (Alaska 2000).

<sup>7</sup>            [Snook v. Bowers](#), 12 P.3d 771 (Alaska 2000).

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#### V. Particular Properties and Estates Affected

##### A. In General

## § 254. Land under or surrounded by water; accretions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 6

The fact that land is covered by water does not render the acquisition of title thereto impossible.<sup>1</sup>Where land under water is the subject of private ownership, adverse possession may be acquired by any means that actually and notoriously exclude and oust the true owner. Neither the physical ouster of the owner nor the actual residence of the adverse claimant is required.<sup>2</sup>Where property claimed adversely consists of a fresh-water pond or stream surrounded by lands of different owners, whose titles as riparian owners include the land under the water to the center of such pond or stream, the acts of ownership must indicate a change of condition, showing a notorious claim of title, accompanied by the essential elements of adverse possession.<sup>3</sup>

Title to an island may be acquired by adverse possession,<sup>4</sup>as well as title to a peninsula.<sup>5</sup>

The ownership of accretions to land may be acquired by adverse possession.<sup>6</sup>One who has acquired title to land by adverse possession is entitled to any accretions thereto regardless of the time of their formation.<sup>7</sup>Accretions to an island held adversely and occupied for more than the statutory period belong to the owner of the island and not to the riparian owner to whom the island or a part of it would otherwise belong.<sup>8</sup>

The construction and maintenance of permanent structures in a river clearly indicate a change of condition, showing a notorious claim of title to riparian rights.<sup>9</sup>

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#### Footnotes

<sup>1</sup> [Leake v. Richardson](#), 199 Va. 967, 103 S.E.2d 227 (1958); [Illinois Steel Co. v. Bilot](#), 109 Wis. 418, 85 N.W. 402 (1901).

As to land under navigable or public waters, see [§ 263](#).

As to acquisition of water or water rights by adverse possession or prescription, see [Am. Jur. 2d, Waters §§ 382 to](#)

394.

<sup>2</sup> *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 85 N.W. 402 (1901).

As to actual possession as a required element of adverse possession, see §§ 15 to 21.

<sup>3</sup> *Leake v. Richardson*, 199 Va. 967, 103 S.E.2d 227 (1958).

<sup>4</sup> *Burket v. Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958); *James v. McNair*, 164 Neb. 1, 81 N.W.2d 813 (1957).

<sup>5</sup> *Springer v. Durette*, 217 Or. 196, 342 P.2d 132 (1959).

<sup>6</sup> *Gaskill v. Cook*, 315 S.W.2d 747 (Mo. 1958); *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960).

As to rights to accreted land, generally, see *Am. Jur. 2d, Waters* §§ 328 to 330.

<sup>7</sup> *Rieke v. Olander*, 207 Kan. 510, 485 P.2d 1335 (1971); *Peterson v. Harpst*, 247 S.W.2d 663 (Mo. 1952); *Kapp v. Hansen*, 79 S.D. 279, 111 N.W.2d 333 (1961).

<sup>8</sup> *Burket v. Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958).

<sup>9</sup> *Scott v. Burwell's Bay Imp. Ass'n*, 281 Va. 704, 708 S.E.2d 858 (2011).

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#### V. Particular Properties and Estates Affected

##### A. In General

## § 255. Cemetery or burial lots

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 6

The general rule is that a burial or cemetery lot may be acquired by adverse possession.<sup>1</sup> While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement, subject to control by the State in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same general character of adverse possession that will confer title to real estate will suffice to confer such right.<sup>2</sup> Thus, title to a burial lot with the rights in cemetery aisles or lanes may be acquired by adverse possession or prescription according to statutory and other legal requirements.<sup>3</sup>

#### Observation:

A distinction is generally recognized between a claim of title to a cemetery being devoted to a public and charitable use and a claim against a private interest in a specific lot or lots.<sup>4</sup> As between opposing private claims to the proprietary rights and interests in a burial lot in an established public cemetery, such rights may be acquired by adverse possession in the absence of previous interment on the lot.<sup>5</sup>

A burial lot may be adversely held without inclosure as long as it is marked, by gravestones or otherwise, as a burial place.<sup>6</sup> However, title to a burial lot is not acquired by adverse possession or prescription, notwithstanding that occupancy thereof for more than the statutory period was notorious and adverse in the general sense of the rule regarding adverse possession, where it was due to a mistake as to the boundary line of an adjoining lot purchased by the ancestor of the person claiming adversely, and there was no desire or purpose on the part of the possessor or that of the descendants to claim more than the lot purchased.<sup>7</sup>



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Footnotes

- <sup>1</sup> Brunton v. Roberts, 265 Ky. 569, 97 S.W.2d 413, 107 A.L.R. 1289 (1936); Forest Home Cemetery Ass'n v. Dardanella Financial Corp., 329 N.W.2d 885 (S.D. 1983); Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705, 21 A.L.R. 645 (1921).
- <sup>2</sup> Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705, 21 A.L.R. 645 (1921).  
As to the nature of the right, title, or interest in a cemetery lot, generally, see Am. Jur. 2d, Cemeteries §§ 28 to 32.
- <sup>3</sup> Brunton v. Roberts, 265 Ky. 569, 97 S.W.2d 413, 107 A.L.R. 1289 (1936).
- <sup>4</sup> Billings v. Paine, 319 S.W.2d 653 (Mo. 1959); Forest Home Cemetery Ass'n v. Dardanella Financial Corp., 329 N.W.2d 885 (S.D. 1983).  
As to public property, generally, see §§ 257 to 263.
- <sup>5</sup> Billings v. Paine, 319 S.W.2d 653 (Mo. 1959); Forest Home Cemetery Ass'n v. Dardanella Financial Corp., 329 N.W.2d 885 (S.D. 1983).
- <sup>6</sup> Roumillot v. Gardner, 113 Ga. 60, 38 S.E. 362 (1901); Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705, 21 A.L.R. 645 (1921).
- <sup>7</sup> Brunton v. Roberts, 265 Ky. 569, 97 S.W.2d 413, 107 A.L.R. 1289 (1936).

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### 3 Am. Jur. 2d Adverse Possession § 256

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### A. In General

## § 256. Life tenancies, remainders, and reversions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 6

A third person may acquire the title to the interest of a life tenant in lands in which there is a life estate and remainder, by adverse possession for the statutory period, but the title thus acquired does not affect the estate in remainder, nor can it be defeated by a conveyance by the life tenant of the life tenant's interest in the land to the remainderman.<sup>1</sup> Possession adverse to a life tenant is not per se adverse to a remainderman.<sup>2</sup> A remainderman, having no right to possession until the death of the life tenant, or not being bound to enter until then to establish a claim against interference with an easement of way appurtenant to the property, is not barred by adverse possession that might result against the life tenant.<sup>3</sup> Thus, where there is adverse occupancy of land subject to a life estate, the statute of limitations does not generally run against remaindermen until the life estate has terminated, for until then, the possession is not adverse as to them<sup>4</sup> because they do not have a right of entry and possession until the life estate is ended.<sup>5</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Testators' granddaughter's right to take possession of property, which testators conveyed to her while retaining a life estate, and thus her right to bring a quiet title action, as a remainderman, accrued, and 15-year limitation period began to run, when both testators died and life estate terminated. [Mich. Comp. Laws Ann. § 600.5801\(4\)](#). [Everson v. Williams](#), 328 Mich. App. 383, 937 N.W.2d 697 (2019).

#### [END OF SUPPLEMENT]

Footnotes

- <sup>1</sup> [Meadows v. Hardcastle](#), 219 Ark. 406, 242 S.W.2d 710 (1951).  
As to adverse possession involving life tenancies and remainders and reversions, see §§ [221](#) to [225](#).
- <sup>2</sup> [Content v. Dalton](#), 122 N.J. Eq. 425, 194 A. 286, 112 A.L.R. 1031 (Ct. Err. & App. 1937).
- <sup>3</sup> [Frawley v. Forrest](#), 310 Mass. 446, 38 N.E.2d 631, 138 A.L.R. 999 (1941).
- <sup>4</sup> [United Fuel Gas Co. v. Dyer](#), 185 F.2d 99 (4th Cir. 1950).
- <sup>5</sup> [Heustess v. Oswalt](#), 253 Ark. 730, 488 S.W.2d 707 (1973); [Maxwell v. Hamel](#), 138 Neb. 49, 292 N.W. 38 (1940).

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#### V. Particular Properties and Estates Affected

##### B. Public Property

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  7 to 9

#### A.L.R. Library

A.L.R. Index, Adverse Possession

West's A.L.R. Digest, [Adverse Possession](#)  7 to 9

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### 3 Am. Jur. 2d Adverse Possession § 257

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#### V. Particular Properties and Estates Affected


##### B. Public Property

##### 1. In General

## § 257. Generally; property of federal government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  7

#### A.L.R. Library

[Use of property by public as affecting acquisition of title by adverse possession, 56 A.L.R.3d 1182](#)

Adverse possession is a doctrine that applies only to private property.<sup>1</sup> Generally, title by adverse possession cannot be acquired as to public property<sup>2</sup> or to property held as a public trust.<sup>3</sup> Ordinarily, in the absence of legislation providing otherwise, the statute of limitations does not run against the government,<sup>4</sup> and therefore, title to public lands cannot be acquired by adverse possession as against the United States,<sup>5</sup> a state,<sup>6</sup> or local governmental bodies<sup>7</sup> except as may be provided specifically by statute.<sup>8</sup>

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#### Footnotes

<sup>1</sup> [Vezey v. Green, 171 P.3d 1125 \(Alaska 2007\).](#)

<sup>2</sup> [Engel v. U.S., 258 F.2d 50 \(6th Cir. 1958\); Smith v. U.S., 28 Fed. Cl. 430 \(1993\), decision aff'd, 19 F.3d 39 \(Fed. Cir. 1994\); Harrison v. Everett, 135 Colo. 55, 308 P.2d 216 \(1957\); Deer Island Ass'n v. Trolle, 181 Conn. 201, 435 A.2d 10 \(1980\); State Highway Dept. of Ga. v. Harris, 214 Ga. 521, 106 S.E.2d 19 \(1958\); Gauger v. State, 249 Kan. 86, 815 P.2d 501 \(1991\); Wood v. Mayo, 240 La. 109, 121 So. 2d 503 \(1960\); Portland Water Dist. v. Town of Standish, 2006 ME 104, 905 A.2d 829 \(Me. 2006\); Davis v. Hall, 2012 MT 125, 365 Mont. 216, 280 P.3d 261 \(2012\); Corsi v.](#)

Town of Bedford, 58 A.D.3d 225, 868 N.Y.S.2d 258 (2d Dep't 2008); *Hernik v. Director of Highways*, 169 Ohio St. 403, 8 Ohio Op. 2d 438, 160 N.E.2d 249 (1959); *Merritt Independent School Dist. No. 2 of Beckham County v. Jones*, 1952 OK 381, 207 Okla. 376, 249 P.2d 1007 (1952); *Com., Dept. of Transp. v. J. W. Bishop & Co., Inc.*, 497 Pa. 58, 439 A.2d 101 (1981); *Benson v. Hodgdon*, 187 Vt. 607, 2010 VT 11, 992 A.2d 1053 (2010).

When the public holds an easement, the “lands held for any public purpose” prong of the statute barring adverse possession of lands or tenements owned by the United States or the State, of school lands, and of lands held for any public purpose is satisfied, barring adverse possession claims against that property. *Kiely v. Graves*, 173 Wash. 2d 926, 271 P.3d 226 (2012).

As to public lands, generally, see *Am. Jur. 2d, Public Lands* §§ 1 et seq.

<sup>3</sup> *Messersmith v. Mayor and Common Council of Riverdale*, 223 Md. 323, 164 A.2d 523 (1960).

<sup>4</sup> *City of Marietta v. CSX Transp., Inc.*, 272 Ga. 612, 533 S.E.2d 372 (2000); *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099 (1932); *Kimball v. Turner*, 993 P.2d 303 (Wyo. 1999).

<sup>5</sup> *U.S. v. State of Cal.*, 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947), opinion supplemented on other grounds, 332 U.S. 804, 68 S. Ct. 20, 92 L. Ed. 382 (1947); *U.S. v. Hato Rey Bldg. Co., Inc.*, 886 F.2d 448 (1st Cir. 1989); *Yamashita v. People of Territory of Guam*, 59 F.3d 114 (9th Cir. 1995) (regarding United States property in Guam); *Carr v. Moore*, 119 Iowa 152, 93 N.W. 52 (1903).

<sup>6</sup> § 258.

<sup>7</sup> § 259.

<sup>8</sup> *U.S. v. Vasarajs*, 908 F.2d 443 (9th Cir. 1990).

### 3 Am. Jur. 2d Adverse Possession § 258

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### V. Particular Properties and Estates Affected


##### B. Public Property

##### 1. In General

## § 258. Property of state government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  7

Adverse possession will not lie against the State.<sup>1</sup>Also, because a state's rights in land are not always enforced and protected with the same vigilance as private rights, no person can acquire title to state lands by adverse possession.<sup>2</sup>Thus, the assertion, by one who is encroaching on state property, of the presumption that possession of property peaceably acquired is lawful, cannot be used to circumvent the fundamental principle that adverse rights cannot run against the State,<sup>3</sup>no matter how peaceful the encroachment has been or for how long.<sup>4</sup>

The general rule that title by adverse possession cannot be acquired against the State applies with particular force to state lands appropriated to a public use<sup>5</sup>or made inalienable by statute or constitutional provision,<sup>6</sup>although the application of this rule may be limited where neither the State nor its grantees have considered the subject property to be held in sovereign trust.<sup>7</sup>The rule has been applied to highways,<sup>8</sup>lands granted to the State in aid of railroad construction or other land used by the State in aid of other internal improvements,<sup>9</sup>school and university property,<sup>10</sup>land under state waters,<sup>11</sup>islands,<sup>12</sup>accretions to riparian lands owned by a state,<sup>13</sup>and lands in a forest preserve.<sup>14</sup>In some jurisdictions, the rule applies to lands forfeited to the State for nonpayment of taxes<sup>15</sup>while it has not been followed in such instances in other jurisdictions.<sup>16</sup>

The general rule that title cannot be acquired by adverse possession against the State has no application in litigation where the State is only a nominal party, its name being used merely for the enforcement of the rights of third persons who alone will enjoy the benefits.<sup>17</sup>Even in states in which the statute does not run against the government, one may acquire rights in public lands by adverse occupancy against all third persons,<sup>18</sup>and this is true even though the claimant admits the government's ownership.<sup>19</sup>In other words, the claimant's possession may be adverse to third persons without being hostile to the government.<sup>20</sup>

<b>Observation:</b>
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Although the statute of limitations will not ordinarily run against the State, in some cases, there may be a presumption of a lost grant, that is, a conveyance from the State may be presumed from exclusive possession under a claim of ownership for a long time.<sup>21</sup> The greatest practical difference between adverse possession and the doctrine of a presumption of grant to possessor by the State is that the latter allows assertions of claims against the sovereign despite statutes barring adverse possession against the State.<sup>22</sup>

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## Footnotes

- <sup>1</sup> City of Marietta v. CSX Transp., Inc., 196 F.3d 1300, 45 Fed. R. Serv. 3d 1142 (11th Cir. 1999), certified question answered, 272 Ga. 612, 533 S.E.2d 372 (2000); U.S. v. Fenton, 27 F. Supp. 816 (D. Idaho 1939); Wyatt v. Wycough, 232 Ark. 760, 341 S.W.2d 18 (1960); Goldman v. Quadrato, 142 Conn. 398, 114 A.2d 687, 55 A.L.R.2d 549 (1955); Patton v. North Jersey Dist. Water Supply Com'n, 93 N.J. 180, 459 A.2d 1177 (1983); State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994); New 52 Project, Inc. v. Proctor, 122 Ohio St. 3d 1, 2009-Ohio-1766, 907 N.E.2d 305 (2009); Com., Dept. of Transp. v. J. W. Bishop & Co., Inc., 497 Pa. 58, 439 A.2d 101 (1981); Gorman v. City of Woodinville, 175 Wash. 2d 68, 283 P.3d 1082 (2012).
- <sup>2</sup> State v. Tallman, 139 N.H. 223, 652 A.2d 134 (1994).
- <sup>3</sup> Arkansas Game and Fish Com'n v. Lindsey, 292 Ark. 314, 730 S.W.2d 474 (1987); Ketchum v. Whitfield County, 270 Ga. 180, 508 S.E.2d 639 (1998); Hernik v. Director of Highways, 169 Ohio St. 403, 8 Ohio Op. 2d 438, 160 N.E.2d 249 (1959).
- <sup>4</sup> Hernik v. Director of Highways, 169 Ohio St. 403, 8 Ohio Op. 2d 438, 160 N.E.2d 249 (1959).
- <sup>5</sup> Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238 (Del. Ch. 1978); Trigg v. Allemand, 95 N.M. 128, 619 P.2d 573 (Ct. App. 1980); Smith v. People, 9 A.D.2d 205, 193 N.Y.S.2d 127 (3d Dep't 1959).
- <sup>6</sup> City of New York v. Wilson & Co., 278 N.Y. 86, 15 N.E.2d 408 (1938).
- <sup>7</sup> People v. System Properties, Inc., 2 N.Y.2d 330, 160 N.Y.S.2d 859, 141 N.E.2d 429 (1957).
- <sup>8</sup> § 261.
- <sup>9</sup> Wright v. Louisville & N.R. Co., 203 Ala. 118, 82 So. 132 (1919); Pearce v. Cone, 147 Fla. 165, 2 So. 2d 360 (1941).
- <sup>10</sup> § 262.
- <sup>11</sup> § 263.
- <sup>12</sup> Smith v. People, 9 A.D.2d 205, 193 N.Y.S.2d 127 (3d Dep't 1959) (an island in a reservoir).
- <sup>13</sup> Topping v. Cohn, 71 Neb. 559, 99 N.W. 372 (1904).
- <sup>14</sup> People v. Baldwin, 233 N.Y. 672, 135 N.E. 964 (1922).
- <sup>15</sup> Bigler v. Graham County, 128 Ariz. 474, 626 P.2d 1106 (Ct. App. Div. 2 1981).
- <sup>16</sup> To the contrary, see Ortiz v. Pacific States Properties, 96 Cal. App. 2d 34, 215 P.2d 514 (2d Dist. 1950); Wood v. Mayo, 240 La. 109, 121 So. 2d 503 (1960).
- <sup>17</sup> Thomas v. Young, 196 Va. 1166, 87 S.E.2d 127, 50 A.L.R.2d 592 (1955).
- <sup>18</sup> Hamblin v. Woolley, 64 Ariz. 152, 167 P.2d 100 (1946); Mackinac Island Development Co., Ltd. v. Burton Abstract



and Title Co., 132 Mich. App. 504, 349 N.W.2d 191 (1984); Test v. Reichert, 144 Neb. 836, 14 N.W.2d 853, 153 A.L.R. 504 (1944).

<sup>19</sup> Hamblin v. Woolley, 64 Ariz. 152, 167 P.2d 100 (1946); Blumer v. Iowa Railroad Land Co., 129 Iowa 32, 105 N.W. 342 (1905), *aff'd*, 206 U.S. 482, 27 S. Ct. 769, 51 L. Ed. 1148 (1907); Fear v. Barwise, 93 Kan. 131, 143 P. 505 (1914); Stonum v. Davis, 348 Mo. 267, 152 S.W.2d 1067 (1941); Test v. Reichert, 144 Neb. 836, 14 N.W.2d 853, 153 A.L.R. 504 (1944); Boe v. Arnold, 54 Or. 52, 102 P. 290 (1909).

<sup>20</sup> Hamblin v. Woolley, 64 Ariz. 152, 167 P.2d 100 (1946); Fear v. Barwise, 93 Kan. 131, 143 P. 505 (1914); Stonum v. Davis, 348 Mo. 267, 152 S.W.2d 1067 (1941).

As to what constitutes hostile possession as an element of adverse possession, see §§ 38 to 56.

<sup>21</sup> U.S. v. Fullard-Leo, 331 U.S. 256, 67 S. Ct. 1287, 91 L. Ed. 1474 (1947); Kohala Corp. v. State, 69 Haw. 54, 732 P.2d 652 (1987); Trustees of Schools of Tp. No. 8 v. Lilly, 373 Ill. 431, 26 N.E.2d 489 (1940) (80 years).

<sup>22</sup> Board of Trustees of Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900, 45 Ed. Law Rep. 919 (Miss. 1988).

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### 3 Am. Jur. 2d Adverse Possession § 259

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#### V. Particular Properties and Estates Affected


##### B. Public Property

##### 1. In General

## § 259. Property held by municipalities, counties, and other political units

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  7, 9

#### A.L.R. Library

[Use of property by public as affecting acquisition of title by adverse possession, 56 A.L.R.3d 1182](#)

Generally, property held by municipal and quasi-municipal corporations cannot be acquired by adverse possession, at least in so far as such property is held for the public<sup>1</sup> or owned in the municipality's governmental capacity.<sup>2</sup> This is true even though the property has not been irrevocably dedicated to public use.<sup>3</sup> This rule has been applied to the property of counties,<sup>4</sup> municipalities,<sup>5</sup> towns,<sup>6</sup> cities,<sup>7</sup> school districts and universities,<sup>8</sup> irrigation districts,<sup>9</sup> and flood management districts.<sup>10</sup>

A municipality does not forfeit its immunity from adverse possession merely by lack of use of property that is intended for development for public use at some future date.<sup>11</sup> Further, for purposes of the prohibition on adverse possession of property held or controlled by a municipality for public use, land does not lose its character as a public property merely because no public funds are expended for the maintenance or upkeep of the public facility.<sup>12</sup>

However, in some jurisdictions, either as a matter of general law or because of legislation, the property of counties, municipal and quasi-municipal corporations, and towns is deemed to be subject to adverse occupancy,<sup>13</sup> and in particular, such property may be subject to adverse possession if it has not been dedicated to a public use,<sup>14</sup> or the public has not accepted the dedication,<sup>15</sup> or the property is not devoted to a public use.<sup>16</sup> Once property has been dedicated, however, it cannot later be acquired by adverse possession.<sup>17</sup>

The statutory exemption for lands given, granted, sequestered, or appropriated to public, pious, or charitable use is not

construed to provide a town with a blanket exemption from adverse possession claims but to provide only for the presumption that property is given to public use which can be rebutted by evidence to the contrary, resulting in property not being exempt from adverse possession claims.<sup>18</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Condemned property that was held for eventual resale by a political subdivision after the original public purpose for the condemnation had lapsed did not constitute a public use of the property that afforded the political subdivision immunity from adverse possession claims, and thus remand was warranted to address citizen's adverse possession claim against city concerning undeveloped city property that was originally condemned for transit purposes, but the transit purposes lapsed in late 1970s, in city's action for ejectment in which citizen sought to quiet title to property and claimed ownership by adverse possession. 42 Pa. Cons. Stat. Ann. § 5530. *City of Philadelphia v. Galdo*, 217 A.3d 811 (Pa. 2019).

### [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> *Meshberg v. Bridgeport City Trust Co.*, 180 Conn. 274, 429 A.2d 865 (1980); *Waterman v. Smith*, 94 So. 2d 186 (Fla. 1957); *Fischer v. City of Sauk Rapids*, 325 N.W.2d 816 (Minn. 1982).
- <sup>2</sup> *Gallo v. City of New York*, 51 A.D.3d 630, 857 N.Y.S.2d 681 (2d Dep't 2008).
- <sup>3</sup> *City of Oakland v. Burns*, 46 Cal. 2d 401, 296 P.2d 333 (1956); *Goldman v. Quadrato*, 142 Conn. 398, 114 A.2d 687, 55 A.L.R.2d 549 (1955); *Waterman v. Smith*, 94 So. 2d 186 (Fla. 1957); *State Highway Dept. of Ga. v. Harris*, 214 Ga. 521, 106 S.E.2d 19 (1958); *Messersmith v. Mayor and Common Council of Riverdale*, 223 Md. 323, 164 A.2d 523 (1960).
- <sup>4</sup> *Harrison v. Everett*, 135 Colo. 55, 308 P.2d 216 (1957); *Williams v. Fayette County*, 270 Ga. 528, 510 S.E.2d 825 (1999); *Moultrie v. Wright*, 266 Ga. 30, 464 S.E.2d 194 (1995).
- <sup>5</sup> *Campanelli v. Candlewood Hills Tax Dist.*, 126 Conn. App. 135, 10 A.3d 1073 (2011); *Hames v. City of Marietta*, 212 Ga. 331, 92 S.E.2d 534 (1956); *City of Louisville v. Louisville Scrap Material Co., Inc.*, 932 S.W.2d 352 (Ky. 1996); *Town of Sedgwick v. Butler*, 1998 ME 280, 722 A.2d 357 (Me. 1998); *Gallo v. City of New York*, 51 A.D.3d 630, 857 N.Y.S.2d 681 (2d Dep't 2008); *Kiely v. Graves*, 173 Wash. 2d 926, 271 P.3d 226 (2012).
- <sup>6</sup> *Town of Refugio v. Heard*, 95 S.W.2d 1008 (Tex. Civ. App. San Antonio 1936), rev'd in part on other grounds, 129 Tex. 349, 103 S.W.2d 728 (1937).
- <sup>7</sup> *Leeds v. City of Muldraugh*, 329 S.W.3d 341 (Ky. Ct. App. 2010); *City of Dallas v. Turley*, 316 S.W.3d 762 (Tex. App. Dallas 2010), review denied, (Aug. 26, 2011).
- <sup>8</sup> § 262.
- <sup>9</sup> *Fresno Irr. Dist. v. Smith*, 58 Cal. App. 2d 48, 136 P.2d 382 (4th Dist. 1943).
- <sup>10</sup> *Miami Conservancy Dist. v. Elleman*, 50 Ohio App. 2d 357, 4 Ohio Op. 3d 313, 363 N.E.2d 593 (2d Dist. Miami County 1976).
- <sup>11</sup> *American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 215 Conn. 68, 574 A.2d 796 (1990).

- <sup>12</sup> Kiely v. Graves, 173 Wash. 2d 926, 271 P.3d 226 (2012).
- <sup>13</sup> State of Alabama v. Schmidt, 232 U.S. 168, 34 S. Ct. 301, 58 L. Ed. 555 (1914); Thompson v. Morris, 218 Ark. 542, 237 S.W.2d 473, 24 A.L.R.2d 627 (1951); Haas v. Board of Com'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 206 La. 378, 19 So. 2d 173 (1944) (levee district); Warren County v. Lamkin, 93 Miss. 123, 46 So. 497 (1908).
- <sup>14</sup> Deer Island Ass'n v. Trolle, 181 Conn. 201, 435 A.2d 10 (1980); Goldman v. Quadrato, 142 Conn. 398, 114 A.2d 687, 55 A.L.R.2d 549 (1955); Cobb County v. Crew, 267 Ga. 525, 481 S.E.2d 806 (1997); City of New Iberia v. Romero, 391 So. 2d 548 (La. Ct. App. 3d Cir. 1980).
- <sup>15</sup> Gregg Neck Yacht Club, Inc. v. County Com'rs of Kent County, 137 Md. App. 732, 769 A.2d 982 (2001).
- <sup>16</sup> Siejack v. City of Baltimore, 270 Md. 640, 313 A.2d 843 (1974) (limiting decision to same or similar facts).
- <sup>17</sup> Gregg Neck Yacht Club, Inc. v. County Com'rs of Kent County, 137 Md. App. 732, 769 A.2d 982 (2001).
- <sup>18</sup> Jarvis v. Gillespie, 155 Vt. 633, 587 A.2d 981 (1991).

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American Jurisprudence, Second Edition | May 2021 Update

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#### V. Particular Properties and Estates Affected


##### B. Public Property

##### 1. In General

## § 260. Property held by municipalities, counties, and other political units—Property held in a proprietary capacity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  9

#### A.L.R. Library

[Private improvement of land dedicated but not used as street as estopping public rights, 36 A.L.R.4th 625](#)

The distinction may be made in some jurisdictions between property that is held in a governmental capacity and that which is owned by a governmental unit in its proprietary capacity, such that title to the latter might be acquired by adverse possession.<sup>1</sup> Indeed, in some jurisdictions, the general rule is that land or property of a governmental unit such as a municipality that is not held for a public use, but is held in a proprietary or business capacity, may be acquired by adverse possession, in the absence of statutory modification or enactments to the contrary.<sup>2</sup> The distinction may extend to property which is not held for the use of which all the inhabitants of a city or other place, and even strangers, are entitled in common but are things which are to be employed by the administrators for the advantage of the inhabitants of the municipality and are therefore subject to acquisitive prescription.<sup>3</sup> However, the distinction between governmental and proprietary use has not been accepted in all jurisdictions as a ground for allowing adverse possession against a governmental unit.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Lewis v. Village of Lyons, 54 A.D.2d 488, 389 N.Y.S.2d 674 \(4th Dep't 1976\)](#) (municipality); [Pioneer Investment & Trust Co. v. Board of Education of Salt Lake City, 35 Utah 1, 99 P. 150 \(1909\)](#) (municipality); [Sisson v. Koelle, 10](#)

Wash. App. 746, 520 P.2d 1380 (Div. 2 1974) (county).

<sup>2</sup> Goldman v. Quadrato, 142 Conn. 398, 114 A.2d 687, 55 A.L.R.2d 549 (1955); Read v. Montgomery County, 101 Md. App. 62, 643 A.2d 476 (1994); Monthie v. Boyle Road Associates, L.L.C., 281 A.D.2d 15, 724 N.Y.S.2d 178, 153 Ed. Law Rep. 741 (2d Dep't 2001).

As to property held by municipalities, counties, and other political units, see § 259.

<sup>3</sup> Town of Broussard v. Broussard Volunteer Fire Dept., 357 So. 2d 25 (La. Ct. App. 3d Cir. 1978).

<sup>4</sup> Grand Lodge of Ga., Independent Order of Odd Fellows v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970).

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### 3 Am. Jur. 2d Adverse Possession § 261

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### B. Public Property

##### 2. Particular Kinds of Property Used by the Public

## § 261. Highways, streets, parks, and the like

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  8(1), 8(2)

The general rule, sometimes embodied in statute, is that the statute of limitations does not run in favor of those who occupy property held for public use as a street or highway<sup>1</sup> and that title cannot be acquired thereto by such occupancy<sup>2</sup> no matter how long the occupancy has been continued and whatever may have been its character.<sup>3</sup> Thus, one cannot acquire rights in a public highway by adverse possession.<sup>4</sup> There are, however, jurisdictions in which municipal property of this character may be acquired by adverse possession.<sup>5</sup>

Where such highways have not been opened or used, in many jurisdictions, the general rule that highways cannot be lost through adverse possession applies<sup>6</sup> while in other jurisdictions, when streets are laid out on a plat but are not so used by the public, they are nothing more than private ways and may be adversely possessed.<sup>7</sup> Thus, in some states, title by adverse possession may be acquired relative to streets or parks that are unopened<sup>8</sup> or unaccepted.<sup>9</sup> In the absence of passage of title to the public, a public roadway is not created which would be immune from adverse possession.<sup>10</sup> In some jurisdictions, title may be acquired by the adverse possession of land when its use as a highway has been abandoned<sup>11</sup> or vacated.<sup>12</sup> Title may not be acquired by the adverse possession of a longstanding public trail.<sup>13</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Statute making permanent the dedication, gift, or purchase of right of way for any public highway, regardless of any subsequent encroachments by fences, buildings, or otherwise applies to acquiescence claims; nothing in the plain language of the statute invites courts to distinguish between different legal theories used to assert a private claim of title or right to a public highway, both adverse possession claims and acquiescence claims seek title to disputed property by virtue of

possession, and both involve a limitations period. *M.C.L.A.* § 247.190. *Haynes v. Village of Beulah*, 308 Mich. App. 465, 865 N.W.2d 923 (2014), appeal denied, 865 N.W.2d 33 (Mich. 2015).

**[END OF SUPPLEMENT]**

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**Footnotes**

- <sup>1</sup> *Messersmith v. Mayor and Common Council of Riverdale*, 223 Md. 323, 164 A.2d 523 (1960); *McCauley v. Thompson-Nistler*, 2000 MT 215, 301 Mont. 81, 10 P.3d 794 (2000); *Bauer Enterprises, Inc. v. City of Elkins*, 173 W. Va. 438, 317 S.E.2d 798 (1984).
- <sup>2</sup> *Baertsch v. County of Lewis and Clark*, 256 Mont. 114, 845 P.2d 106 (1992); *Catalano v. Woodward*, 617 A.2d 1363 (R.I. 1992); *Bauer Enterprises, Inc. v. City of Elkins*, 173 W. Va. 438, 317 S.E.2d 798 (1984).
- <sup>3</sup> *Staunton v. Texas Company*, 237 F.2d 195 (2d Cir. 1956); *Wood v. Setliff*, 229 Ark. 1007, 320 S.W.2d 655 (1959) (by statute); *City of Oakland v. Burns*, 46 Cal. 2d 401, 296 P.2d 333 (1956) (by statute); *Waterman v. Smith*, 94 So. 2d 186 (Fla. 1957) (alley); *State Highway Dept. of Ga. v. Harris*, 214 Ga. 521, 106 S.E.2d 19 (1958); *Messersmith v. Mayor and Common Council of Riverdale*, 223 Md. 323, 164 A.2d 523 (1960); *Petition of Cara Ave., Sandy Beach, Cass County*, 350 Mich. 283, 86 N.W.2d 319 (1957); *Application of Stein*, 256 Minn. 485, 99 N.W.2d 204 (1959) (public way); *City of Billings v. Pierce Packing Co.*, 117 Mont. 255, 161 P.2d 636 (1945); *Steadman v. Town of Pinetops*, 251 N.C. 509, 112 S.E.2d 102 (1960); *City of Jamestown v. Miemietz*, 95 N.W.2d 897 (N.D. 1959); *Town of Chouteau v. Blankenship*, 1944 OK 275, 194 Okla. 401, 152 P.2d 379, 171 A.L.R. 87 (1944); *Hoffman v. City of Pittsburgh*, 365 Pa. 386, 75 A.2d 649 (1950) (public square); *Town of Warren v. Wietecha*, 84 R.I. 407, 124 A.2d 861 (1956); *Bauer Enterprises, Inc. v. City of Elkins*, 173 W. Va. 438, 317 S.E.2d 798 (1984).
- <sup>4</sup> *Blagbrough Family Realty Trust v. A & T Forest Products, Inc.*, 155 N.H. 29, 917 A.2d 1221 (2007); *Benson v. Hodgdon*, 187 Vt. 607, 2010 VT 11, 992 A.2d 1053 (2010).
- <sup>5</sup> *Southern Pac. Co. v. City and County of San Francisco*, 62 Cal. 2d 50, 41 Cal. Rptr. 79, 396 P.2d 383 (1964) (recognizing the rule but holding that the use of a vacated street by a railroad was permissive and not adverse); *Mauck v. Bailey*, 247 Md. 434, 231 A.2d 685 (1967).
- <sup>6</sup> *Wallace v. Cable*, 87 Kan. 835, 127 P. 5 (1912); *City of Billings v. Pierce Packing Co.*, 117 Mont. 255, 161 P.2d 636 (1945); *Landon v. City of Binghamton*, 79 A.D.2d 810, 435 N.Y.S.2d 91 (3d Dep't 1980); *Teter v. Teter*, 163 W. Va. 770, 260 S.E.2d 270 (1979) (holding that the status of a platted street as a public way defeats adverse possession).
- <sup>7</sup> *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).  
As to what constitutes hostile possession as an element of adverse possession, see §§ 38 to 56.
- <sup>8</sup> *In re Willard Parker Hospital*, 217 N.Y. 1, 111 N.E. 256 (1916); *Byerlyte Corp. v. City of Cleveland*, 32 Ohio L. Abs. 609, 1940 WL 2976 (Ct. App. 8th Dist. Cuyahoga County 1940).
- <sup>9</sup> *Steadman v. Town of Pinetops*, 251 N.C. 509, 112 S.E.2d 102 (1960); *Parrillo v. Riccitelli*, 84 R.I. 276, 123 A.2d 248 (1956).
- <sup>10</sup> *Geronimo Hotel, Inc. v. City of Tucson*, 121 Ariz. 446, 591 P.2d 72 (Ct. App. Div. 2 1978) (holding that a resolution constituting planning does not constitute the establishment of a public roadway).
- <sup>11</sup> *Meeks v. Hill*, 557 So. 2d 1238 (Ala. 1990); *Alsman v. Matthews*, 125 Ind. App. 132, 122 N.E.2d 145 (1954); *In re Willard Parker Hospital*, 217 N.Y. 1, 111 N.E. 256 (1916); *Farrar v. Murphy*, 1956 OK 298, 305 P.2d 862 (Okla. 1956) (alley).
- <sup>12</sup> *Truck-Trailer Supply Co. v. Farmer*, 181 Kan. 396, 311 P.2d 1004 (1957); *Woolaver v. Texaco, Inc.*, 638 S.W.2d 153 (Tex. App. Fort Worth 1982), writ refused n.r.e., (Nov. 10, 1982).



<sup>13</sup> [Vezey v. Green, 171 P.3d 1125 \(Alaska 2007\).](#)

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### 3 Am. Jur. 2d Adverse Possession § 262

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### V. Particular Properties and Estates Affected


##### B. Public Property

##### 2. Particular Kinds of Property Used by the Public

## § 262. School or university property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  8(3)

In many jurisdictions, title to school property or land devoted to school purposes cannot be acquired by adverse possession.<sup>1</sup> Constitutional or statutory provisions may provide the basis for the rule that school property cannot be acquired by adverse possession,<sup>2</sup> including where school property is deemed within the scope of a statute excepting public lands from the statute of limitations for prescriptive purposes.<sup>3</sup>

The rule that adverse possession does not run against municipal property devoted to a public use may apply to school district lands.<sup>4</sup> The rule that title by adverse possession or prescription cannot be acquired as against the State may be applied with respect to lands donated by the United States to the State for public school purposes or otherwise acquired and held by the State for such purposes or for university or college purposes.<sup>5</sup>

Under particular circumstances, however, title to certain school lands has been held subject to acquisition by adverse possession,<sup>6</sup> and in jurisdictions where there is no statute to the contrary, the statute of limitations may run against a school district.<sup>7</sup>

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#### Footnotes

<sup>1</sup> Lovejoy v. School Dist. No. 46 of Sedgwick County, 129 Colo. 306, 269 P.2d 1067 (1954); Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932); Martin v. Louisiana Cent. Lumber Co., 157 La. 538, 102 So. 662 (1925); Junes v. Junes, 158 Minn. 53, 196 N.W. 806 (1924); Grand Lodge of Okl., Independent Order of Odd Fellows v. Webb, 1956 OK 342, 306 P.2d 340 (Okla. 1956).

<sup>2</sup> Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932); Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930); Jackson v. Nacogdoches County, 188 S.W.2d 237 (Tex. Civ. App. Dallas 1945); Van Wagoner v. Whitmore, 58 Utah 418, 199

P. 670 (1921).

<sup>3</sup> Wilson v. Wheeler Farms, Inc., 591 S.W.2d 287 (Mo. Ct. App. S.D. 1979).

<sup>4</sup> Murtaugh v. Chicago, M. & St. P. Ry. Co., 102 Minn. 52, 112 N.W. 860 (1907); Merritt Independent School Dist. No. 2 of Beckham County v. Jones, 1952 OK 381, 207 Okla. 376, 249 P.2d 1007 (1952).  
As to property held by municipalities, generally, see § 259.

<sup>5</sup> State of Alabama v. Schmidt, 232 U.S. 168, 34 S. Ct. 301, 58 L. Ed. 555 (1914); Murtaugh v. Chicago, M. & St. P. Ry. Co., 102 Minn. 52, 112 N.W. 860 (1907); State v. City of Seattle, 57 Wash. 602, 107 P. 827 (1910).  
As to state property, generally, see § 258.

<sup>6</sup> Brown v. Board of Education, Monroeville Local School Dist., 20 Ohio St. 2d 68, 49 Ohio Op. 2d 347, 253 N.E.2d 767 (1969).

<sup>7</sup> Thompson v. Morris, 218 Ark. 542, 237 S.W.2d 473, 24 A.L.R.2d 627 (1951).

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### 3 Am. Jur. 2d Adverse Possession § 263

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#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### B. Public Property

##### 2. Particular Kinds of Property Used by the Public

## § 263. Navigable and other public waters; river and lake beds and shores

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  8(1)

It is the general rule that an adverse possession cannot ripen into title to waters on public lands except where it is otherwise provided by statute.<sup>1</sup> Generally, as against the State, the title to land under water cannot be acquired by adverse possession for any period.<sup>2</sup> This may extend to barring property owners from acquiring ownership of a strip of land cleared by dredging, exposing property previously under water and thus held by the State in public trust.<sup>3</sup>

Where it is provided by statute that lands under water may not be granted by the State, there is an additional reason against the acquisition of title to such lands by adverse possession since title by adverse possession rests on a presumed grant, and the statute forbids any such presumption.<sup>4</sup> The rule that title by adverse possession or prescription cannot be acquired as against the United States or as against the State is applied in a number of cases involving tidelands<sup>5</sup> and swamplands.<sup>6</sup> Title to land under water vested in a municipality cannot be divested by adverse possession, even after it is filled, if it was made inalienable by statute or is held for a public purpose.<sup>7</sup>

Title to navigable waters cannot be acquired by adverse possession.<sup>8</sup> Neither can title by adverse possession to lands under navigable waters be acquired as against the State.<sup>9</sup> Nor can title to the beds or shores of such waters,<sup>10</sup> or to islands therein, be so acquired.<sup>11</sup>

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#### Footnotes

- <sup>1</sup> [Jersey City v. Hall](#), 79 N.J.L. 559, 76 A. 1058 (N.J. Ct. Err. & App. 1910).  
As to public lands, generally, see [Am. Jur. 2d, Public Lands §§ 1 et seq.](#)  
As to acquisition of water or water rights by adverse possession or prescription, generally, see [Am. Jur. 2d, Waters §§ 382 to 394.](#)  
As to adverse possession of wharf property, see [Am. Jur. 2d, Wharves § 7.](#)

- <sup>2</sup> Cedar Rapids Gaslight Co. v. City of Cedar Rapids, 144 Iowa 426, 120 N.W. 966 (1909), *aff'd*, 223 U.S. 655, 32 S. Ct. 389, 56 L. Ed. 594 (1912) (land under river); State v. Akers, 92 Kan. 169, 140 P. 637 (1914), *aff'd*, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917); Jersey City v. Hall, 79 N.J.L. 559, 76 A. 1058 (N.J. Ct. Err. & App. 1910).  
As to land under or surrounded by water that is not navigable or public, see § 254.
- <sup>3</sup> Hall v. Nascimento, 594 A.2d 874 (R.I. 1991).
- <sup>4</sup> Sterling v. Sterling, 211 Md. 493, 128 A.2d 277 (1957).
- <sup>5</sup> Marine Ry. & Coal Co. v. U.S., 257 U.S. 47, 42 S. Ct. 32, 66 L. Ed. 124 (1921); People ex inf. Board of Harbor Com'rs for San Diego Bay v. Kerber, 152 Cal. 731, 93 P. 878 (1908); O'Neill v. State Highway Dept., 50 N.J. 307, 235 A.2d 1 (1967).  
As to federal property, see § 257.  
As to state property, see § 258.
- <sup>6</sup> Brinneman v. Scholem, 95 Ark. 65, 128 S.W. 584 (1910); Penick v. Floyd Willis Cotton Co., 119 Miss. 828, 81 So. 540 (1919).
- <sup>7</sup> In re College Point Industrial Park, Urban Renewal, Project II, New York City, 72 A.D.2d 745, 421 N.Y.S.2d 258 (2d Dep't 1979).
- <sup>8</sup> People ex inf. Board of Harbor Com'rs for San Diego Bay v. Kerber, 152 Cal. 731, 93 P. 878 (1908); Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Gray v. Gray, 178 Md. 566, 16 A.2d 166 (1940).  
As to navigable or public waters, generally, see Am. Jur. 2d, Waters §§ 135 to 188.
- <sup>9</sup> People ex inf. Board of Harbor Com'rs for San Diego Bay v. Kerber, 152 Cal. 731, 93 P. 878 (1908); Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Sterling v. Sterling, 211 Md. 493, 128 A.2d 277 (1957); Gray v. Gray, 178 Md. 566, 16 A.2d 166 (1940).
- <sup>10</sup> Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 44 So. 976 (1907).
- <sup>11</sup> U.S. v. Turner, 175 F.2d 644 (5th Cir. 1949); Wunderlich v. Cates, 213 Ark. 695, 212 S.W.2d 556 (1948); Bode v. Rollwitz, 60 Mont. 481, 199 P. 688 (1921).

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#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### B. Public Property

##### 3. Property Imbued with Public Purpose; Railroad Property

## § 264. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  8(1)

The principles which exempt the government and its subdivisions from application of the statute of limitations, and which prevent the acquisition of public property by adverse possession, may also apply to the preservation of property owned by quasi-public corporations, such as canal, railroad, gas and electric, water, telegraph, and telephone companies.<sup>1</sup> An important factor is whether the property is deemed to be dedicated to a public use as provided by statutory provisions limiting the applicability of adverse possession to such property,<sup>2</sup> considering the general rule that no prescriptive right can be acquired in property affected with public interest or dedicated to public use.<sup>3</sup> Thus, while title to realty held in fee by the State or any of its subdivisions for public use generally cannot be acquired by adverse possession, a public entity may claim immunity from adverse possession only to the extent that the property against which the claim has been asserted is held for public use.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Harvey v. Missouri Pac. R. Co.](#), 111 Kan. 371, 207 P. 761, 50 A.L.R. 300 (1922); [Bode v. Rollwitz](#), 60 Mont. 481, 199 P. 688 (1921).

<sup>2</sup> [Boyle v. Burk](#), 749 S.W.2d 264 (Tex. App. Fort Worth 1988), writ denied, (Sept. 14, 1988) (utility power line easement not within statute).

<sup>3</sup> [Norfolk and Western Ry. Co. v. Waselchak](#), 244 Va. 329, 421 S.E.2d 424 (1992).

<sup>4</sup> [American Trading Real Estate Properties, Inc. v. Town of Trumbull](#), 215 Conn. 68, 574 A.2d 796 (1990).

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Works.

### 3 Am. Jur. 2d Adverse Possession § 265

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#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### B. Public Property

##### 3. Property Imbued with Public Purpose; Railroad Property

## § 265. Railroad property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  8(4)

In some jurisdictions, the doctrine prevails that land embraced within a railroad right-of-way is held for a public purpose, and for that reason cannot be acquired by adverse possession,<sup>1</sup> so long as a railroad is operated thereon,<sup>2</sup> largely based on the theory that the general public has the same interest in the preservation and maintenance of railroads as it has in the maintenance of other highways.<sup>3</sup> In some states, railroad rights-of-way are expressly exempted by statute from the operation of the statute of limitations as being public highways or lands devoted to public use<sup>4</sup> while in other jurisdictions, the statute protecting a railroad from the loss of its land by adverse possession does not require that the railroad actually use the land for a railroad purpose.<sup>5</sup> Generally, land acquired by a railroad under a grant from the public cannot be extinguished by adverse possession<sup>6</sup> because the right so granted is inalienable.<sup>7</sup>

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#### Footnotes

<sup>1</sup> Northern Pac. Ry. Co. v. Concannon, 239 U.S. 382, 36 S. Ct. 156, 60 L. Ed. 342 (1915); Bangor & Aroostook R. Co. v. Daigle, 607 A.2d 533 (Me. 1992).

<sup>2</sup> Gustin v. Scheele, 250 Neb. 269, 549 N.W.2d 135 (1996).

<sup>3</sup> McLucas v. St. Joseph & G.I.R. Co., 67 Neb. 603, 93 N.W. 928 (1903), aff'd, 67 Neb. 603, 97 N.W. 312 (1903); Muse v. Seaboard Air Line Ry., 149 N.C. 443, 63 S.E. 102 (1908).  
As to adverse possession of highways, see § 261.

<sup>4</sup> Hurlbut Rogers Machinery Co. v. Boston & M.R.R., 235 Mass. 402, 126 N.E. 789 (1920); Central Vermont Ry. Co. v. Bowers, 100 Vt. 26, 134 A. 608 (1926).



<sup>5</sup> McLaurin v. Winston-Salem Southbound Ry. Co., 323 N.C. 609, 374 S.E.2d 265 (1988).

<sup>6</sup> Great Northern Ry. Co. v. Steinke, 261 U.S. 119, 43 S. Ct. 316, 67 L. Ed. 564 (1923); Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 91 Fla. 612, 108 So. 689, 46 A.L.R. 870 (1926).

<sup>7</sup> Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917); Etheredge v. Chicago, B. & Q.R. Co., 105 Neb. 778, 181 N.W. 928 (1921).

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#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### B. Public Property

##### 3. Property Imbued with Public Purpose; Railroad Property

## § 266. Railroad property—Railroad property subject to adverse possession

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  8(4)

Title by adverse possession may be acquired to lands within the right-of-way of a railroad company in some jurisdictions,<sup>1</sup> particularly in the absence of a statute to the contrary and where the title or easement of the railroad to the land was not acquired by a public grant<sup>2</sup> and including particularly portions of the right-of-way as have not been dedicated to public use.<sup>3</sup> Public policy does not bar a private citizen's claim for adverse possession of a railroad right-of-way when the railroad acquired the property by means of a private sale.<sup>4</sup> Thus, in states where no controlling statutes intervene, such parts of a railroad right-of-way as were acquired by private grant, purchase, gift, condemnation, or prescription and are not enclosed or covered by the tracks of the railroad company and its structures, may be acquired by other persons by adverse possession.<sup>5</sup>

Railroad property acquired by a private sale and held in fee simple, which has not been designated for the railroad's line or other railroad operations, is subject to adverse possession.<sup>6</sup>

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#### Footnotes

<sup>1</sup> Iowa R. Land Co. v. Blumer, 206 U.S. 482, 27 S. Ct. 769, 51 L. Ed. 1148 (1907); Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 91 Fla. 612, 108 So. 689, 46 A.L.R. 870 (1926); Bowers v. Atchison, T. & S.F. Ry. Co., 119 Kan. 202, 237 P. 913, 42 A.L.R. 228 (1925); Delaware, L. & W. R. Co. v. Tobyhanna Co., 228 Pa. 487, 77 A. 811 (1910); Dulin v. Ohio River R. Co., 73 W. Va. 166, 80 S.E. 145 (1913).

<sup>2</sup> Louisville & N.R. Co. v. Malchow, 216 Ala. 656, 114 So. 53 (1927); Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 91 Fla. 612, 108 So. 689, 46 A.L.R. 870 (1926); Atlantic Coast Line R. Co. v. Dawes, 100 S.C. 258, 84 S.E. 830 (1915); Dulin v. Ohio River R. Co., 73 W. Va. 166, 80 S.E. 145 (1913).

<sup>3</sup> Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 91 Fla. 612, 108 So. 689, 46 A.L.R. 870 (1926); Chicago, M. & St. P. Ry. Co. v. Hanken, 140 Iowa 372, 118 N.W. 527 (1908).

<sup>4</sup> Meiers v. Wang, 192 Wis. 2d 115, 531 N.W.2d 54 (1995).

<sup>5</sup> Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 91 Fla. 612, 108 So. 689, 46 A.L.R. 870 (1926); Meiers v. Wang, 192 Wis. 2d 115, 531 N.W.2d 54 (1995).

<sup>6</sup> Gustin v. Scheele, 250 Neb. 269, 549 N.W.2d 135 (1996).

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### 3 Am. Jur. 2d Adverse Possession V C Refs.

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### Research References

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#) 🔑 5.1, 17

West's Key Number Digest, [Mines and Minerals](#) 🔑 49

#### A.L.R. Library

A.L.R. Index, Adverse Possession

A.L.R. Index, Mines and Minerals

West's A.L.R. Digest, [Adverse Possession](#) 🔑 5.1, 17

West's A.L.R. Digest, Mines and Minerals 🔑 49

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### 3 Am. Jur. 2d Adverse Possession § 267

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##### 1. In General

## § 267. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

The factors required to establish adverse possession of minerals are generally identical with those required for the adverse possession of land<sup>1</sup>although where there is a severance between the surface and mineral estates, the activity must be consistent with mining for the full statutory period.<sup>2</sup>Thus, as a general rule, to acquire title to mines or minerals by adverse possession, the possession must be open, notorious, continuous, hostile, and under a claim of right and, in jurisdictions where color of title is required, under adequate color of title.<sup>3</sup>Possession under a void claim is not permissive and may support a title acquired by adverse possession.<sup>4</sup>

One cannot obtain a royalty interest in minerals by adverse possession. The collection of royalty payments for a term of years does not constitute adverse possession of the minerals in place; such collection of royalty payments is merely conversion of the minerals that have already been produced and does not affect what remains in the ground.<sup>5</sup>Knowledge of the contents of an instrument attempting to make an assignment of natural gas distribution rights cannot ripen into adverse possession.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [White Log Jellico Coal Co., Inc. v. Zipp](#), 32 S.W.3d 92 (Ky. Ct. App. 2000).  
As to mines and minerals, generally, see [Am. Jur. 2d, Mines and Minerals](#) §§ 1 et seq.

<sup>2</sup> [White Log Jellico Coal Co., Inc. v. Zipp](#), 32 S.W.3d 92 (Ky. Ct. App. 2000).  
As to the absence of severance, see [§ 269](#).  
As to the effect of severance on adverse possession, generally, see [§ 273](#).

<sup>3</sup> [Parker v. Sinclair](#), 59 F.2d 1033 (App. D.C. 1932); [Big Three Min. & Mill. Co. v. Hamilton](#), 157 Cal. 130, 107 P. 301

(1909); *White Log Jellico Coal Co., Inc. v. Zipp*, 32 S.W.3d 92 (Ky. Ct. App. 2000).

<sup>4</sup> *25 Corp., Inc. v. Eisenman Chemical Co.*, 101 Nev. 664, 709 P.2d 164 (1985).

<sup>5</sup> *Stratmann v. Stratmann*, 6 Kan. App. 2d 403, 628 P.2d 1080 (1981).

<sup>6</sup> *Boggs v. Burton*, 547 S.W.2d 786 (Ky. Ct. App. 1977).

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##### 1. In General

## § 268. Extent of possession

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

As a general rule, title founded on adverse possession of mines, minerals, or mineral lands will be limited to that area of which actual possession has been maintained.<sup>1</sup> Where adverse possession of mineral lands is taken and maintained under color of title, however, it is widely recognized that the general rule that actual possession of a part of premises under color of title will be extended by construction for adverse possession purposes to the whole premises may be applied.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Davis v. Federal Land Bank of Columbia](#), 219 N.C. 248, 13 S.E.2d 417 (1941).

<sup>2</sup> [Pollard v. Simpson](#), 240 Ala. 401, 199 So. 560 (1940); [Lundy v. Lakin](#), 96 Cal. App. 2d 221, 215 P.2d 61 (3d Dist. 1950); [Kinder v. La Salle County Carbon Coal Co.](#), 310 Ill. 126, 141 N.E. 537 (1923); [Diederich v. Ware](#), 288 S.W.2d 643 (Ky. 1956); [Vance v. Guy](#), 223 N.C. 409, 27 S.E.2d 117 (1943); [Medusa Portland Cement Co. v. Lamantina](#), 353 Pa. 53, 44 A.2d 244 (1945).

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##### 2. In Absence of Severance

## § 269. Generally; possession of surface

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

In the absence of a severance of the mineral and surface estates, mineral lands do not constitute an exception to the general rule that the title of the owner of real property includes not the surface thereof alone but also that which lies beneath and above the surface.<sup>1</sup> Therefore, an adverse possession of the surface of mineral lands in the absence of severance may ripen into title to the minerals, as well as to the land.<sup>2</sup> However, if the possession of the surface is limited to a particular purpose, such as a right-of-way, title to the minerals does not pass thereby.<sup>3</sup>

In the absence of a severance of title to the surface estate of land from the underlying minerals, the possession of the surface must be actual,<sup>4</sup> hostile,<sup>5</sup> visible and exclusive,<sup>6</sup> continuous and uninterrupted,<sup>7</sup> in good faith,<sup>8</sup> and under a claim of title, for the statutory period, in order to give title to the minerals by adverse possession. Residence on the land is not, however, required.<sup>9</sup>

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#### Footnotes

<sup>1</sup> Jones v. Brown, 211 Ark. 164, 199 S.W.2d 973 (1947); Red River Lumber Co. v. Null, 66 Cal. App. 499, 226 P. 812 (3d Dist. 1924); Lykes Bros., Inc. v. McConnel, 115 So. 2d 606 (Fla. 2d DCA 1959); Kinder v. La Salle County Carbon Coal Co., 301 Ill. 362, 133 N.E. 772 (1921); McPherson v. Thompson, 203 Ky. 35, 261 S.W. 853 (1924); Smith v. Nyreen, 81 N.W.2d 769 (N.D. 1957); Chapman v. Parks, 347 S.W.2d 805 (Tex. Civ. App. Amarillo 1961), writ refused n.r.e., (Oct. 3, 1961).  
As to the effect of severance of the mineral and surface estates, see §§ 273 to 278.

<sup>2</sup> Stowers v. Huntington Development & Gas Co., 72 F.2d 969, 98 A.L.R. 536 (C.C.A. 4th Cir. 1934); Goree v. Sanders, 203 La. 859, 14 So. 2d 744 (1943); Broughton v. Humble Oil & Refining Co., 105 S.W.2d 480 (Tex. Civ. App. El Paso 1937), writ refused.



- <sup>3</sup> Michigan Cent. R. Co. v. Garfield Petroleum Corp., 292 Mich. 373, 290 N.W. 833, 127 A.L.R. 507 (1940).
- <sup>4</sup> Whittington v. Cameron, 385 Ill. 99, 52 N.E.2d 134, 150 A.L.R. 551 (1943); Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S.W. 130 (1916); Waterman v. Tidewater Associated Oil Co., 213 La. 588, 35 So. 2d 225 (1947).
- <sup>5</sup> Midkiff v. Colton, 252 F. 420 (C.C.A. 4th Cir. 1918); Whittington v. Cameron, 385 Ill. 99, 52 N.E.2d 134, 150 A.L.R. 551 (1943); Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S.W. 130 (1916); Michigan Cent. R. Co. v. Garfield Petroleum Corp., 292 Mich. 373, 290 N.W. 833, 127 A.L.R. 507 (1940).
- <sup>6</sup> Whittington v. Cameron, 385 Ill. 99, 52 N.E.2d 134, 150 A.L.R. 551 (1943).
- <sup>7</sup> United Fuel Gas Co. v. Dyer, 185 F.2d 99 (4th Cir. 1950) (applying West Virginia law).
- <sup>8</sup> Waterman v. Tidewater Associated Oil Co., 213 La. 588, 35 So. 2d 225 (1947).
- <sup>9</sup> Whittington v. Cameron, 385 Ill. 99, 52 N.E.2d 134, 150 A.L.R. 551 (1943).

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##### 2. In Absence of Severance

## § 270. Possession of minerals

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

It is widely held that title to minerals may pass by adverse possession of the minerals, even in the absence of a severance of the surface, from the underlying mineral estate.<sup>1</sup>

In order to pass title to minerals by adverse possession in the absence of a severance of the surface from the minerals, the possession relied on must be, for the statutory period, actual;<sup>2</sup> hostile;<sup>3</sup> open, notorious, or visible;<sup>4</sup> continuous;<sup>5</sup> exclusive;<sup>6</sup> and under a claim of right.<sup>7</sup> To establish title by adverse possession, such use must have been made of the mines and mineral rights as they were amenable to.<sup>8</sup> A finding that the adverse claimants established adverse possession may be supported by evidence that they have drilled core holes, have marked the boundary with paint, have built and traversed roads, have posted mining permits, and have made inspections to prevent trespass.<sup>9</sup>

Working part of a mine may constitute adverse possession of the whole property where there is color of title.<sup>10</sup> Presence on the premises at all times is not required.<sup>11</sup>

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#### Footnotes

<sup>1</sup> Lundy v. Lakin, 96 Cal. App. 2d 221, 215 P.2d 61 (3d Dist. 1950); Lockwood v. Carter Oil Co., 73 W. Va. 175, 80 S.E. 814 (1913).

<sup>2</sup> Stark v. Pennsylvania Coal Co., 241 Pa. 597, 88 A. 770 (1913).

<sup>3</sup> Costello v. Muheim, 9 Ariz. 422, 84 P. 906 (1906); Smith v. Kingsley, 331 Pa. 10, 200 A. 11 (1938).

- 4           Pierce v. Barney, 209 Pa. 132, 58 A. 152 (1904).
- 5           Thompson v. Ratcliff, 245 S.W.2d 592 (Ky. 1952) (holding that an abandoned suit to quiet title to the minerals will not affect the continuity of the possession); Davis v. Federal Land Bank of Columbia, 219 N.C. 248, 13 S.E.2d 417 (1941).
- 6           Original Consol. Mining Co. v. Abbott, 167 F. 681 (C.C.D. Mont. 1908).
- 7           Costello v. Muheim, 9 Ariz. 422, 84 P. 906 (1906).
- 8           Davis v. Federal Land Bank of Columbia, 219 N.C. 248, 13 S.E.2d 417 (1941).
- 9           Cullman Wholesale, Inc. v. Simmons, 592 So. 2d 1031 (Ala. 1992).  
As to evidence to establish adverse possession, generally, see § 285.
- 10          Lundy v. Lakin, 96 Cal. App. 2d 221, 215 P.2d 61 (3d Dist. 1950).
- 11          Thompson v. Ratcliff, 245 S.W.2d 592 (Ky. 1952).

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##### 2. In Absence of Severance

## § 271. Possession by cotenant

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

#### A.L.R. Library

[Adverse possession between cotenants who are unaware of cotenancy, 27 A.L.R.4th 420](#)

In accordance with the general rule as to adverse possession between cotenants, and in the absence of a severance of the mineral estate from the surface, the possession of the minerals by one cotenant does not give title by adverse possession as against other cotenants unless there is an ouster of the other cotenants of which they have notice.<sup>1</sup> The general rule that where a cotenant purports to convey not only such cotenant's interest but also the interest of other cotenants, there is an ouster of the other cotenants on which to base adverse possession applies to a conveyance of unsevered minerals by a cotenant.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Frye v. Gullion, 143 Iowa 719, 121 N.W. 563 \(1909\); Fitschen Bros. Commercial Co. v. Noyes' Estate, 76 Mont. 175, 246 P. 773 \(1926\).](#)

As to adverse possession between cotenants, generally, see §§ [190](#) to [212](#).

As to the effect of severance on adverse possession of mines or minerals, see § [273](#).

<sup>2</sup> [Zackery v. Warmack, 213 Ark. 808, 212 S.W.2d 706 \(1948\); Smith v. Kingsley, 331 Pa. 10, 200 A. 11 \(1938\).](#)

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##### 2. In Absence of Severance

## § 272. Payment of taxes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

#### A.L.R. Library

[Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843](#)

In some jurisdictions, the payment of all taxes levied or assessed on a mining claim may be necessary to acquiring title thereto by adverse possession<sup>1</sup> while otherwise, the payment of taxes may be one of the circumstances showing that adverse possession was established.<sup>2</sup> The payment of taxes by an adverse possessor of the surface who conveys the minerals before such possession ripens into title inures to the benefit of the mineral grantee.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Standard Quicksilver Co. v. Habishaw](#), 132 Cal. 115, 64 P. 113 (1901).  
As to the effect of payment of taxes regarding a severed mineral estate, see [§ 281](#).

<sup>2</sup> [Lundy v. Lakin](#), 96 Cal. App. 2d 221, 215 P.2d 61 (3d Dist. 1950).

<sup>3</sup> [Pierson v. Case](#), 272 Ala. 527, 133 So. 2d 239 (1961).

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##### 3. On Occurrence of Severance


##### a. Possession of Surface as Possession of Minerals

## § 273. Possession by adverse claimant of surface

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Generally, after title to the surface estate of land has been severed from title to the underlying mineral estate, title to the minerals cannot be acquired by the adverse possession of the surface.<sup>1</sup>The severance of the title of the mineral estate from the surface estate creates two estates which are as distinct as if they constituted two different parcels of land, from which it naturally follows that the title to one cannot be acquired by adverse possession of the other.<sup>2</sup>Where a portion of the mineral interest is conveyed or reserved, only that portion which is conveyed or reserved is considered severed from the surface estate.<sup>3</sup>Thus, the mere possession of the surface estate cannot constitute adverse possession of the mineral estate.<sup>4</sup>When the surface is separated from the minerals, mineral rights are adversely possessed by drilling and producing the minerals for the statutory period of time.<sup>5</sup>

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#### Footnotes

<sup>1</sup> Winslett v. Rozan, 279 F.2d 654 (10th Cir. 1960); Moragne v. Doe ex dem. Moragne, 143 Ala. 459, 39 So. 161 (1905); Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436 (1929); Uphoff v. Trustees of Tufts College, 351 Ill. 146, 184 N.E. 213, 93 A.L.R. 1224 (1932); Griffith v. J. C. Miller Oil Co., 349 S.W.2d 833 (Ky. 1961); Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433 (1906); Noble v. Kahn, 1952 OK 42, 206 Okla. 13, 240 P.2d 757, 35 A.L.R.2d 119 (1952); Kanawha & Hocking Coal & Coke Co. v. Carbon County, 535 P.2d 1139 (Utah 1975).

<sup>2</sup> Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 180 N.W. 787 (1920); State ex rel. Cross v. Board of Land Com'rs, 50 Wyo. 181, 58 P.2d 423 (1936).

<sup>3</sup> Fadern v. Kimball, 1979 OK CIV APP 40, 612 P.2d 287 (Ct. App. Div. 1 1979).



<sup>4</sup> [Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc., 15 S.W.3d 727 \(Ky. 2000\)](#), as amended, (Mar. 22, 2000) and as amended, (Mar. 30, 2000) and as modified on denial of reh'g, (May 18, 2000).

<sup>5</sup> [Thedford v. Union Oil Co. of California, 3 S.W.3d 609 \(Tex. App. Dallas 1999\)](#).  
As to the sufficiency of mining operations to establish possession, see § 278.

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##### 3. On Occurrence of Severance


##### a. Possession of Surface as Possession of Minerals

## § 274. Possession by owner of surface

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Where the title to the mineral rights has been severed from the title to the surface, possession of the surface by its owner is not adverse to the owner of the minerals below it; the mineral owner does not lose possession of the minerals by any length of nonuser, and the surface owner cannot acquire title to the minerals by adverse possession based on his or her exclusive and continued occupancy of the surface<sup>1</sup>even though title to minerals was asserted at all times by the surface owner.<sup>2</sup>The rule is not changed ordinarily by the fact that the possession of the surface is under an instrument conveying the entire estate without any mention of the mineral rights,<sup>3</sup>or under a deed that describes the land by metes and bounds and makes no reference to the mineral rights reserved by an earlier deed,<sup>4</sup>or under a deed purporting to convey the mineral estate to the surface owner,<sup>5</sup>or under a deed reserving the minerals,<sup>6</sup>or where no one knows what minerals are or are not present.<sup>7</sup>

After a severance of a mineral interest from the ownership of the surface, the possession of the surface is not adverse to the separate mineral estate even where the surface owner also owns a portion of the minerals.<sup>8</sup>The presumption that a party who has possession of the surface of land has possession of the subsoil does not exist when these rights are severed.<sup>9</sup>

#### Observation:

The general rule may be altered by statute and permit adverse holding of a mineral estate by the possessor of the surface.<sup>10</sup>

In some jurisdictions, where the owner of the surface is considered a trustee of the minerals for the use and benefit of the owner of the minerals,<sup>11</sup> it is recognized that the owner of the surface may repudiate this trust and claim adversely to the mineral holder by acts or words that clearly and unmistakably bring home to the mineral holder the knowledge that the surface owner is claiming the minerals adversely.<sup>12</sup> However, such owner nor anyone entering under such owner can acquire title to the minerals by adverse possession except on a very strong showing of a repudiation of the trust relationship.<sup>13</sup> In other cases, it has been recognized that the general rule may not be applicable where a subsequent purchaser of the land has no notice of the severance.<sup>14</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Former owner of surface estate was no longer entitled to enforce a clause in an addendum to a pipeline right of way agreement making grantee responsible for certain “taxes, charges and market enhancements charged to the flow of gas or liquids from” a gas well on the property after owner sold the surface estate; the clause dealt with pipeline activities at the surface, the agreement was not dependent upon ownership of the mineral estate, and, other than a requirement that an additional payment be made to owner for a second pipeline, no rights contained in the right of way agreement were retained in the sale of the surface estate. [Hills and Hollers, LLC v. Ohio Gathering Company, LLC, 2018-Ohio-2814, 116 N.E.3d 801 \(Ohio Ct. App. 7th Dist. Belmont County 2018\), appeal not allowed, 154 Ohio St. 3d 1464, 2018-Ohio-5209, 114 N.E.3d 215 \(2018\).](#)

## [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [United Fuel Gas Co. v. Dyer, 185 F.2d 99 \(4th Cir. 1950\); Stowers v. Huntington Development & Gas Co., 72 F.2d 969, 98 A.L.R. 536 \(C.C.A. 4th Cir. 1934\); Parker v. Sinclair, 59 F.2d 1033 \(App. D.C. 1932\); Jones v. Brown, 211 Ark. 164, 199 S.W.2d 973 \(1947\); Pickens v. Adams, 7 Ill. 2d 283, 131 N.E.2d 38, 56 A.L.R.2d 605 \(1955\); Scott v. Laws, 185 Ky. 440, 215 S.W. 81, 13 A.L.R. 369 \(1919\); Bilby v. Wire, 77 N.W.2d 882 \(N.D. 1956\); Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433 \(1906\); Hassell v. Texaco, Inc., 1962 OK 136, 372 P.2d 233 \(Okla. 1962\); McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415 \(1953\); Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 \(1947\). When adverse possession commences before a severance of the mineral estate, the adverse possession includes both the surface and mineral estate. \[Gulley v. Davis, 321 S.W.3d 213 \\(Tex. App. Houston 1st Dist. 2010\\), review denied, \\(Jan. 14, 2011\\).\]\(#\)](#)
- <sup>2</sup> [Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436 \(1929\).](#)
- <sup>3</sup> [Uphoff v. Trustees of Tufts College, 351 Ill. 146, 184 N.E. 213, 93 A.L.R. 1224 \(1932\).](#)
- <sup>4</sup> [J.R. Crowe Coal & Mining Co. v. Atkinson, 85 Kan. 357, 116 P. 499 \(1911\); Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 \(1947\).](#)
- <sup>5</sup> [Douglass v. Mounce, 1956 OK 288, 303 P.2d 430 \(Okla. 1956\).](#)
- <sup>6</sup> [Greene v. White, 137 Tex. 361, 153 S.W.2d 575, 136 A.L.R. 626 \(1941\).](#)
- <sup>7</sup> [Bilby v. Wire, 77 N.W.2d 882 \(N.D. 1956\).](#)
- <sup>8</sup> [Douglass v. Mounce, 1956 OK 288, 303 P.2d 430 \(Okla. 1956\).](#)

- <sup>9</sup> Stowers v. Huntington Development & Gas Co., 72 F.2d 969, 98 A.L.R. 536 (C.C.A. 4th Cir. 1934); Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S.E. 485 (1905).
- <sup>10</sup> Nelson v. Bloodworth, 238 Ga. 264, 232 S.E.2d 547 (1977).
- <sup>11</sup> Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956).
- <sup>12</sup> Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956).
- <sup>13</sup> Kentucky River Coal Corp. v. Bayless, 318 S.W.2d 554 (Ky. 1955).
- <sup>14</sup> Goree v. Sanders, 203 La. 859, 14 So. 2d 744 (1943).

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### 3 Am. Jur. 2d Adverse Possession § 275

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### a. Possession of Surface as Possession of Minerals

## § 275. Severance after surface has been claimed adversely

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Where an unsevered mineral land is held adversely, and either the owner of the land or the one in adverse occupancy conveys or leases the mineral estate, the adverse possession will continue in the same manner as if there had been no such conveyance or lease.<sup>1</sup>A deed severing the mineral rights from the surface, executed by one who is in possession and continues his or her possession the full length of the limitation period, does not stop the running of the statute of limitations in favor of the adverse possession of mineral rights.<sup>2</sup>The adverse possession of the surface by one who conveys the mineral estate before such possession ripens into title inures to the benefit of the mineral grantee.<sup>3</sup>The adverse possession of a grantee of the surface estate continuing after severance may inure to the benefit of a grantor who reserves the mineral estate and will ripen a limitation title in such grantor to the minerals.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Tennessee Coal, Iron & R. Co. v. Brewer](#), 92 F.2d 804 (C.C.A. 5th Cir. 1937); [Fadem v. Kimball](#), 1979 OK CIV APP 40, 612 P.2d 287 (Ct. App. Div. 1 1979); [Rio Bravo Oil Co. v. Staley Oil Co.](#), 138 Tex. 198, 158 S.W.2d 293 (Comm'n App. 1942).

<sup>2</sup> [Kilpatrick v. Gulf Production Co.](#), 139 S.W.2d 653 (Tex. Civ. App. Beaumont 1940), writ dismissed, judgment correct.

<sup>3</sup> [Pierson v. Case](#), 272 Ala. 527, 133 So. 2d 239 (1961).

<sup>4</sup> [Houston Oil Co. of Tex. v. Moss](#), 155 Tex. 157, 284 S.W.2d 131 (1955).

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### 3 Am. Jur. 2d Adverse Possession § 276

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### a. Possession of Surface as Possession of Minerals

## § 276. Severance while land is subject to tax lien; possession under tax deed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Where a mineral interest is severed from the surface at a time when the whole interest in the land is subject to a county's lien for taxes, the severance does not affect the county.<sup>1</sup> The rule that the possession of the surface of the land does not constitute possession of a severed mineral interest<sup>2</sup> is not applicable in such case. Accordingly, a grantee who enters into actual and hostile possession of land under the color of a tax deed, which grants a new presumptive title to every interest in the land, acquires title to all such interests provided the possession continues for the statutory period, and the claimant complies with other requirements for acquiring title by adverse possession.<sup>3</sup>

#### Observation:

A tax title granted by the county is regarded as unitary; it is title to a single estate which comprises every possible interest in the land, and possession under such title is considered as unitary as if the former chain of title had not shown any separation of estates or interests as between the parties privy to it.<sup>4</sup>

Footnotes

- <sup>1</sup> [Payne v. A. M. Fruh Co.](#), 98 N.W.2d 27 (N.D. 1959).
- <sup>2</sup> [§ 273](#).
- <sup>3</sup> [Payne v. A. M. Fruh Co.](#), 98 N.W.2d 27 (N.D. 1959).
- <sup>4</sup> [Payne v. A. M. Fruh Co.](#), 98 N.W.2d 27 (N.D. 1959).  
As to tax deeds, generally, see [Am. Jur. 2d, State and Local Taxation §§ 874 to 888](#).

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#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### b. Particulars of Possession

## § 277. Possession of minerals

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Although after severance of the surface and mineral estates title to the minerals cannot be acquired by adverse possession of the surface alone,<sup>1</sup> title to the minerals may nevertheless be acquired by adverse possession not only by the owner of the surface but also by a person having no interest in the surface<sup>2</sup> provided there is an actual;<sup>3</sup> hostile;<sup>4</sup> open, notorious, or visible;<sup>5</sup> peaceable;<sup>6</sup> exclusive;<sup>7</sup> continuous<sup>8</sup> possession thereof, under a claim of right,<sup>9</sup> for the statutory period.<sup>10</sup> There is some authority that possession of the minerals under color of title also may be necessary.<sup>11</sup>

After severance of the surface and mineral estate, the mineral owner must be ousted to lose the mineral rights, and there cannot be an ouster in the absence of an act that actually takes the mineral out of the owner's possession.<sup>12</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Property owners were not in actual possession of oil and gas in and underneath their property, as required to acquire title to the oil and gas through adverse possession, where the owners had not extracted any of the oil or gas from the property. [Miller v. Mellott, 2019-Ohio-504, 130 N.E.3d 1021](#) (Ohio Ct. App. 7th Dist. Monroe County 2019), decision clarified on reconsideration, [2019-Ohio-4084, 2019 WL 4894090](#) (Ohio Ct. App. 7th Dist. Monroe County 2019).

Because underlying minerals are not subject to maintenance, a productive use as required for adverse possession is any which

takes the mineral out of the record owner's possession; in essence, actual possession requires actual development of the oil and gas mineral rights. [Miller v. Mellott, 2019-Ohio-504, 130 N.E.3d 1021](#) (Ohio Ct. App. 7th Dist. Monroe County 2019), reconsideration granted, [2019-Ohio-4084, 2019 WL 4894090](#) (Ohio Ct. App. 7th Dist. Monroe County 2019).

Ex-husband did not establish that his interests in mineral property were possessory interests, and thus he failed to show an actual and visible appropriation of property, as required to support finding of adverse possession, in post-divorce proceeding involving ex-wife's motion to enforce decree in which she was awarded equal share of ex-husband's mineral interests; although ex-husband stated that the inherited minerals involved originated as mineral interests that have been leased, he did not assert that his mineral interests were possessory interests. [Tex. Civ. Prac. & Rem. Code Ann. § 16.024. Moore v. Moore, 568 S.W.3d 725](#) (Tex. App. Eastland 2019).

**[END OF SUPPLEMENT]**

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Footnotes

<sup>1</sup> § 273.

<sup>2</sup> [Reavis v. Fianza, 215 U.S. 16, 30 S. Ct. 1, 54 L. Ed. 72](#) (1909); [Midkiff v. Colton, 252 F. 420](#) (C.C.A. 4th Cir. 1918); [Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840, 1 A.L.R. 556](#) (C.C.A. 6th Cir. 1918); [Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436](#) (1929); [Diederich v. Ware, 288 S.W.2d 643](#) (Ky. 1956); [Smith v. Pittston Co., 203 Va. 408, 124 S.E.2d 1](#) (1962).

<sup>3</sup> [Downey v. North Alabama Mineral Development Co., 420 So. 2d 68](#) (Ala. 1982) (holding that occasional forays to monitor others' attempts to remove coal are insufficient); [Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436](#) (1929); [Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021](#) (App. 1976), judgment aff'd, [193 Colo. 157, 563 P.2d 950](#) (1977); [McBeth v. Wetnight, 57 Ind. App. 47, 106 N.E. 407](#) (1914) (holding that it is not necessary to live in the mine); [Gordon v. Park, 202 Mo. 236, 100 S.W. 621](#) (1907); [Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433](#) (1906); [Douglass v. Mounce, 1956 OK 288, 303 P.2d 430](#) (Okla. 1956).

<sup>4</sup> [Moragne v. Doe ex dem. Moragne, 143 Ala. 459, 39 So. 161](#) (1905); [Gordon v. Park, 202 Mo. 236, 100 S.W. 621](#) (1907); [Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433](#) (1906); [Barker v. Campbell-Ratcliff Land Co., 1917 OK 208, 64 Okla. 249, 167 P. 468](#) (1917).

<sup>5</sup> [Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840, 1 A.L.R. 556](#) (C.C.A. 6th Cir. 1918); [Downey v. North Alabama Mineral Development Co., 420 So. 2d 68](#) (Ala. 1982) (lack of notice); [Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433](#) (1906); [McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415](#) (1953).

<sup>6</sup> [Gordon v. Park, 202 Mo. 236, 100 S.W. 621](#) (1907).

<sup>7</sup> [Gordon v. Park, 202 Mo. 236, 100 S.W. 621](#) (1907); [Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433](#) (1906).

<sup>8</sup> [Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436](#) (1929); [Gordon v. Park, 202 Mo. 236, 100 S.W. 621](#) (1907); [Gill v. Fletcher, 74 Ohio St. 295, 78 N.E. 433](#) (1906).

<sup>9</sup> [Sanford v. Alabama Power Co., 256 Ala. 280, 54 So. 2d 562](#) (1951); [Kinder v. La Salle County Carbon Coal Co., 301 Ill. 362, 133 N.E. 772](#) (1921).

<sup>10</sup> [Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840, 1 A.L.R. 556](#) (C.C.A. 6th Cir. 1918); [Skelly Oil Co. v. Johnson, 209 Ark. 1107, 194 S.W.2d 425](#) (1946); [Humphreys v. Idaho Gold Mines Development Co., 21 Idaho 126, 120 P. 823](#) (1912); [Cook v. Farley, 195 Miss. 638, 15 So. 2d 352](#) (1943); [Northcut v. Church, 135 Tenn. 541, 188 S.W. 220](#) (1916); [Smith v. Pittston Co., 203 Va. 408, 124 S.E.2d 1](#) (1962); [McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415](#) (1953).

<sup>11</sup> [Calvat v. Juhan, 119 Colo. 561, 206 P.2d 600](#) (1949); [McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415](#) (1953).

<sup>12</sup> Duke Power Co. v. Toms, 118 F.2d 443 (C.C.A. 4th Cir. 1941); Vance v. Pritchard, 213 N.C. 552, 197 S.E. 182 (1938); Hassell v. Texaco, Inc., 1962 OK 136, 372 P.2d 233 (Okla. 1962).

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### 3 Am. Jur. 2d Adverse Possession § 278

American Jurisprudence, Second Edition | May 2021 Update

#### Adverse Possession

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### b. Particulars of Possession

## § 278. Necessity and sufficiency of mining operations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Generally, mining operations are necessary in order to constitute adverse possession of a severed mineral estate.<sup>1</sup> That is, after severance, an adverse possession must consist of the actual taking of possession of the minerals by drilling wells or digging mines and capturing or taking dominion over the minerals, either by producing and removing them or by holding them capped in a completed well to the exclusion of the mineral titleholder and the world, for the statutory period of adverse possession.<sup>2</sup>

Adverse possession requires at least that solid minerals be actually removed from the ground or oil and gas actually produced.<sup>3</sup> Oil and gas leases, while evidence of possession, do not constitute actual possession sufficient for adverse possession of a severed mineral interest,<sup>4</sup> and thus, recording of leases, in reference to a mineral estate severed from the surface estate, is not sufficient to establish an adverse possession in the absence of mining activity on the property itself.<sup>5</sup> Acts of dominion over the minerals entail, at the very least, actual removal of some minerals and includes any acts sufficient to apprise the community that the mineral estate is in the exclusive use and enjoyment of the claiming party.<sup>6</sup> Thus, the sinking of mining shafts and posting of signs and making advertisements offering the product of the mining for sale over a period of years may be sufficient to establish possession of the minerals sufficient to support an adverse possession.<sup>7</sup>

Mining operations are necessary even though it is not known what minerals are or are not present.<sup>8</sup> In accordance with the general rule as to cotenants, where there is a severance of the surface and mineral estates, the possession of the minerals by one cotenant does not give title by adverse possession as against other cotenants unless there is an ouster of which the other cotenants have notice.<sup>9</sup>

Footnotes

- <sup>1</sup> Downey v. North Alabama Mineral Development Co., 420 So. 2d 68 (Ala. 1982); Claybrooke v. Barnes, 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436 (1929); Hassell v. Texaco, Inc., 1962 OK 136, 372 P.2d 233 (Okla. 1962); N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 736 A.2d 780 (1999); Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 (1947).
- <sup>2</sup> Cook v. Farley, 195 Miss. 638, 15 So. 2d 352 (1943); Hassell v. Texaco, Inc., 1962 OK 136, 372 P.2d 233 (Okla. 1962).
- <sup>3</sup> Pickens v. Adams, 7 Ill. 2d 283, 131 N.E.2d 38, 56 A.L.R.2d 605 (1955).
- <sup>4</sup> Sickler v. Pope, 326 N.W.2d 86 (N.D. 1982).
- <sup>5</sup> Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).
- <sup>6</sup> Payne v. Williams, 91 Ill. App. 3d 336, 46 Ill. Dec. 783, 414 N.E.2d 836 (5th Dist. 1980).
- <sup>7</sup> Thweatt v. Halmes, 265 Ark. 606, 580 S.W.2d 685 (1979).
- <sup>8</sup> Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956).
- <sup>9</sup> Pan Mut. Royalties v. Williams, 1961 OK 165, 365 P.2d 138 (Okla. 1961); Silver Surprise, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240 (Div. 3 1976), judgment aff'd, 88 Wash. 2d 64, 558 P.2d 186 (1977).  
As to adverse possession as against cotenants, generally, see § 190.

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### b. Particulars of Possession

## § 279. Extent of operation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

Where there has been a severance of minerals from the surface of land, limited operations involving the working of a part of the mineral estate may not be sufficient to give title by adverse possession to the minerals underlying the whole of it; this is based, in part, on the peculiar problems involved in designating the boundaries of the mineral estate.<sup>2</sup> However, in some cases, under the particular circumstances involved, the working of a part of the property is sufficient to give title to the minerals underlying the whole property.<sup>3</sup> Occasional, desultory, or temporary acts of mining are not sufficient to constitute adverse possession of the minerals after severance of title to the minerals from title to the surface of the land.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Sanford v. Alabama Power Co.](#), 256 Ala. 280, 54 So. 2d 562 (1951); [Piney Oil & Gas Co. v. Scott](#), 258 Ky. 51, 79 S.W.2d 394 (1934); [White v. Miller](#), 78 Misc. 428, 139 N.Y.S. 660 (Sup 1912); [Davis v. Federal Land Bank of Columbia](#), 219 N.C. 248, 13 S.E.2d 417 (1941).

<sup>2</sup> [Diederich v. Ware](#), 288 S.W.2d 643 (Ky. 1956).

<sup>3</sup> [Kinder v. La Salle County Carbon Coal Co.](#), 310 Ill. 126, 141 N.E. 537 (1923).

<sup>4</sup> [Claybrooke v. Barnes](#), 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436 (1929); [Uphoff v. Trustees of Tufts College](#), 351 Ill. 146, 184 N.E. 213, 93 A.L.R. 1224 (1932); [Gordon v. Park](#), 202 Mo. 236, 100 S.W. 621 (1907).

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### b. Particulars of Possession

## § 280. Constructive possession; color of title

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

The rules of constructive possession applicable to surface estates may be applied to mineral estates such that one working part of a well-defined, severed mineral estate may be deemed to be in constructive possession of the whole estate,<sup>1</sup> especially because the courts tend to treat mineral estates and surface estates alike for most other purposes.<sup>2</sup> In order for the rules of constructive possession to operate, however, the adverse possessor must ordinarily have color of title.<sup>3</sup> A surface owner who works the minerals under the land relying on a general warranty deed that does not except the prior severed minerals may be deemed to have color of title to those minerals<sup>4</sup> although the contrary view has also been taken.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Pollard v. Simpson](#), 240 Ala. 401, 199 So. 560 (1940); [Kinder v. La Salle County Carbon Coal Co.](#), 310 Ill. 126, 141 N.E. 537 (1923); [Vance v. Guy](#), 223 N.C. 409, 27 S.E.2d 117 (1943); [Medusa Portland Cement Co. v. Lamantina](#), 353 Pa. 53, 44 A.2d 244 (1945).  
As to the effect of possession under color of title, generally, see [§ 247](#).  
As to what constitutes adverse possession pursuant to color of title, generally, see [§§ 111 to 133](#).
- <sup>2</sup> [Diederich v. Ware](#), 288 S.W.2d 643 (Ky. 1956).
- <sup>3</sup> [Diederich v. Ware](#), 288 S.W.2d 643 (Ky. 1956); [Blacksburg Min. & Mfg. Co. v. Bell](#), 125 Va. 565, 100 S.E. 806 (1919); [White Flame Coal Co. v. Burgess](#), 86 W. Va. 16, 102 S.E. 690 (1920).
- <sup>4</sup> [Sanford v. Alabama Power Co.](#), 256 Ala. 280, 54 So. 2d 562 (1951); [Diederich v. Ware](#), 288 S.W.2d 643 (Ky. 1956);



Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943).

<sup>5</sup>

Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1934).

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#### V. Particular Properties and Estates Affected

##### C. Mines, Minerals, and Mineral Lands

##### 3. On Occurrence of Severance


##### b. Particulars of Possession

## § 281. Payment of taxes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  5.1, 17

West's Key Number Digest, [Mines and Minerals](#)  49

#### A.L.R. Library

[Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843](#)

The payment of taxes assessed against the surface estate does not constitute payment of taxes on severed minerals unless specific reference to this effect is made of record.<sup>1</sup>The surface owner's payment of taxes assessed against the realty involved is not such payment of taxes on the minerals as to give title under a statutory provision regarding payment of taxes for a specified number of successive years, in the absence of payment of taxes on the minerals under a separate assessment of them.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Pond Creek Coal Co. v. Hatfield](#), 239 F. 622 (C.C.A. 6th Cir. 1917); [Winslett v. Rozan](#), 279 F.2d 654 (10th Cir. 1960); [Buckner v. Wright](#), 218 Ark. 448, 236 S.W.2d 720 (1951); [Foss v. Central Pacific R. Co.](#), 9 Cal. App. 2d 117, 49 P.2d 292 (3d Dist. 1935).

As to the payment of taxes as an element of adverse possession, generally, see [§ 134](#).

<sup>2</sup> Downey v. North Alabama Mineral Development Co., 420 So. 2d 68 (Ala. 1982); McCoy v. Lowrie, 42 Wash. 2d 24, 253 P.2d 415 (1953).

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#### Adverse Possession

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#### VI. Practice and Procedure

##### A. In General

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

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### 3 Am. Jur. 2d Adverse Possession § 282

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#### VI. Practice and Procedure

##### A. In General

## § 282. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  110 to 111

Practice and procedure in adverse possession claims is generally consistent with civil practice generally,<sup>1</sup> and as such, ordinary and reasonable extensions of time for the filing of pleadings may be appropriate when timely sought based on good reasons.<sup>2</sup>

Summary judgment is inappropriate if there are disputed material facts regarding an adverse possession<sup>3</sup> although in proper cases where the evidence is sufficient to support the claim of adverse possession based on uncontroverted affidavits, summary judgment may be appropriate.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Solomon's Rock Trust v. Davis](#), 675 A.2d 506 (Me. 1996); [Matzke v. Hackbart](#), 224 Neb. 535, 399 N.W.2d 786 (1987).

As to pleading, generally, see [Am. Jur. 2d, Pleading §§ 1 et seq.](#)

<sup>2</sup> [Solomon's Rock Trust v. Davis](#), 675 A.2d 506 (Me. 1996).

<sup>3</sup> [Boozer v. NCB Nat. Bank of Florida](#), 606 So. 2d 1208 (Fla. 2d DCA 1992); [Read v. Montgomery County](#), 101 Md. App. 62, 643 A.2d 476 (1994); [Rogers v. South Slope Holding Corp.](#), 172 Misc. 2d 33, 656 N.Y.S.2d 169 (Sup 1997), order aff'd as modified on other grounds, 255 A.D.2d 898, 680 N.Y.S.2d 772 (4th Dep't 1998).

<sup>4</sup> [Casini v. Sea Gate Ass'n](#), 262 A.D.2d 593, 692 N.Y.S.2d 676 (2d Dep't 1999).



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#### VI. Practice and Procedure

##### A. In General

## § 283. Plaintiff's plea of acquisition of title by adverse possession

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West's Key Number Digest, [Adverse Possession](#)  110 to 111

#### Forms

Forms relating to complaints, petitions, or declarations, generally, see Am. Jur. Pleading and Practice Forms, Adverse Possession [\[Westlaw® Search Query\]](#)

Forms relating to answers, denials, and defenses, generally, see Am. Jur. Pleading and Practice Forms, Adverse Possession [\[Westlaw® Search Query\]](#)

A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.<sup>1</sup>The logical inference of a presumptive grant need not be specifically pled in order for the trial court to apply the resulting rule of law that determines property interest.<sup>2</sup>Averments that property is used for recreational or farming purposes may be sufficient to establish possession for adverse possession purposes.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Matzke v. Hackbart](#), 224 Neb. 535, 399 N.W.2d 786 (1987).

<sup>2</sup> [El Paso Production Co. v. PWG Partnership](#), 116 N.M. 583, 866 P.2d 311 (1993).

<sup>3</sup> [Catawba Indian Tribe of South Carolina v. State of S.C.](#), 978 F.2d 1334 (4th Cir. 1992).

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##### A. In General

## § 284. Defendant's plea of acquisition of title by adverse possession

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West's Key Number Digest, [Adverse Possession](#)  110 to 111

#### Forms

Forms relating to answers, denials, and defenses, generally, see Am. Jur. Pleading and Practice Forms, Adverse Possession [[Westlaw® Search Query](#)]

The plea of statute in an adverse possession case, being simply a denial of the plaintiff's title, need not be pleaded specially<sup>1</sup>except where a special pleading is required by statute.<sup>2</sup>In some jurisdictions, adverse possession is an affirmative defense which must be pleaded and proved, and it is waived by a failure to do so.<sup>3</sup>In such cases, where the defense is based on a possessory right unaided by title or color of title, it must be specially pleaded either in the answer or by separate pleading.<sup>4</sup>A pleading of adverse possession by defendants for the statutory period is insufficient to constitute a defense, unless it is alleged that such period matured prior to the commencement of the action, since the limitations period must have been completed at the time the suit was commenced, or it will avail the claimant nothing.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Reiter v. Landon Homes, Inc.](#), 56 Misc. 2d 168, 287 N.Y.S.2d 724 (Sup 1968), judgment aff'd, 31 A.D.2d 538, 295 N.Y.S.2d 103 (2d Dep't 1968).

<sup>2</sup> [Strayhorn v. McCall](#), 78 Ark. 209, 95 S.W. 455 (1906).

<sup>3</sup> [Sutton v. Gardner](#), 2011 Ark. App. 737, 387 S.W.3d 185 (2011); [Moses v. Weaver](#), 210 Miss. 228, 49 So. 2d 235

(1950).

<sup>4</sup> Peoples v. Hagaman, 31 Tenn. App. 398, 215 S.W.2d 827 (1948).

<sup>5</sup> Flathead Lumber Corp. v. Everett, 127 Mont. 291, 263 P.2d 376 (1953).

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### Research References

#### West's Key Number Digest

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West's A.L.R. Digest, [Adverse Possession](#)  27, 33, 38, 57, 85, 112 to 114(3)

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##### B. Evidence

##### 1. Burden of Proof

## § 285. Proof of necessary elements generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  112

Under the rule that the doctrine of adverse possession is to be taken strictly, all constituent elements of adverse possession must be proved.<sup>1</sup> It is generally necessary to prove an actual, hostile, open, notorious, visible, exclusive, and continuous possession for the full statutory period.<sup>2</sup> Thus, the elements of adverse possession must be established by clear proofs of acts and conduct fit to put a person of ordinary prudence, and particularly the true owner, on notice that the estate in question is actually, visibly, and exclusively held by the claimant in an antagonistic purpose.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Turnipseed v. Moseley](#), 248 Ala. 340, 27 So. 2d 483, 170 A.L.R. 882 (1946); [Russell v. Davidson](#), 1947 OK 381, 200 Okla. 408, 194 P.2d 887 (1947); [Bull Run Development Corp. v. Jackson](#), 201 Va. 95, 109 S.E.2d 400 (1959).

<sup>2</sup> [White v. Inman](#), 212 Miss. 237, 54 So. 2d 375, 30 A.L.R.2d 380 (1951); [Pike v. Williamson](#), 2011 WL 6371000 (Mo. Ct. App. S.D. 2011), reh'g and/or transfer denied, (Jan. 11, 2012); [Russell v. Davidson](#), 1947 OK 381, 200 Okla. 408, 194 P.2d 887 (1947); [Baxter v. Girard Trust Co.](#), 288 Pa. 256, 135 A. 620, 49 A.L.R. 1011 (1927).

<sup>3</sup> [Falvo v. Pejepsco Indus. Park, Inc.](#), 1997 ME 66, 691 A.2d 1240 (Me. 1997).  
As to the standard of proof, see [§ 295](#).

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##### B. Evidence

##### 1. Burden of Proof

## § 286. Party with burden of proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  112

In accordance with the familiar rule that the burden of proof rests on the party who has the affirmative of an issue, the party relying on a title by adverse possession has the burden of proving all facts necessary to establish such title.<sup>1</sup> Thus, the burden of establishing each and every element of adverse possession is on the party relying on title by adverse possession.<sup>2</sup> Where one party has established a prima facie claim of title to land and the other party claims title by adverse possession, the burden is on the latter affirmatively to establish it by the evidence.<sup>3</sup>

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#### Footnotes

<sup>1</sup> Cousins v. McNeel, 62 So. 3d 1039 (Ala. Civ. App. 2010); Cowan v. Yeisley, 255 P.3d 966 (Alaska 2011); Follett v. Fitzsimmons, 103 Ark. App. 82, 286 S.W.3d 742 (2008); Larson v. Lindsay, 80 Idaho 242, 327 P.2d 775 (1958); Nichols v. Kirchner, 241 Iowa 99, 40 N.W.2d 13 (1949); Sagnibene v. Roy O. Martin Lumber Co., LLC, 68 So. 3d 32 (La. Ct. App. 3d Cir. 2011); Hamlin v. Niedner, 2008 ME 130, 955 A.2d 251 (Me. 2008); Senez v. Collins, 182 Md. App. 300, 957 A.2d 1057 (2008); Taranto v. Peoples Bank of Biloxi, 242 Miss. 607, 136 So. 2d 213 (1962); White v. Wilks, 357 S.W.2d 908 (Mo. 1962); Bell v. Gussenhoven, 132 Mont. 346, 318 P.2d 251 (1957); Akin v. Castleberry, 2012 OK 79, 286 P.3d 638 (Okla. 2012); Norgard v. Busher, 220 Or. 297, 349 P.2d 490, 80 A.L.R.2d 1161 (1960); Ontelaunee Orchards v. Rothermel, 139 Pa. Super. 44, 11 A.2d 543 (1940); Jones v. Leagan, 384 S.C. 1, 681 S.E.2d 6 (Ct. App. 2009); Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366 (Tenn. 2007); Maier v. Giske, 154 Wash. App. 6, 223 P.3d 1265 (Div. 1 2010); Camacho v. Trimble Irrevocable Trust, 2008 WI App 112, 313 Wis. 2d 272, 756 N.W.2d 596 (Ct. App. 2008).

<sup>2</sup> Garringer v. Wingard, 585 So. 2d 898 (Ala. 1991); Harmon v. Ingram, 572 So. 2d 411 (Ala. 1990); Preciado v. Wilde, 139 Cal. App. 4th 321, 42 Cal. Rptr. 3d 792 (2d Dist. 2006); Caminis v. Troy, 300 Conn. 297, 12 A.3d 984 (2011); Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821 (2008); Salvis v. Lawyer, 73 Idaho 469, 253 P.2d 589 (1953); Air Plum Island, Inc. v. Society For Preservation of New England Antiquities, 70 Mass. App. Ct. 246, 873 N.E.2d 1159 (2007);

§ 286. Party with burden of proof, 3 Am. Jur. 2d Adverse Possession § 286

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Burns v. Foster, 348 Mich. 8, 81 N.W.2d 386 (1957); Ford v. Rhymes, 233 Miss. 651, 103 So. 2d 363 (1958); Gaskill v. Cook, 315 S.W.2d 747 (Mo. 1958); City of Deadwood v. Summit, Inc., 2000 SD 29, 607 N.W.2d 22 (S.D. 2000).

As to the elements of adverse possession, generally, see § 9.

<sup>3</sup> Blanton v. Moody, 265 F.2d 533 (5th Cir. 1959).

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##### B. Evidence

##### 1. Burden of Proof

## § 287. When burden shifts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Adverse Possession](#)  112

While a party relying on adverse possession has the burden of proof, where the burden has been met by a showing of continuous hostile possession of the land for more than the statutory period, the burden of proof shifts to the opposing party.<sup>1</sup> Where there has been an open, continuous use of land for the statutory period, the use is deemed against, and not under, the true owner, and the burden of proof is then on the owner to show that the use was permissive and not adverse.<sup>2</sup> Thus, after a claimant has established the elements of a prescriptive right, a presumption of adverse use arises, and the burden shifts to the landowner affected by the prescriptive claim to establish that the claimant's use was permissive<sup>3</sup> or to show that the use was by license.<sup>4</sup>

Where an adverse claimant has shown proper adverse possession during the statutory period, the burden of showing that the period was interrupted is on the party who seeks to benefit thereby.<sup>5</sup> If a presumption of adverse use is established for adverse possession purposes, the other party may overcome that presumption by showing that the use was permissive.<sup>6</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

The general rule is that where no evidence is presented to establish how the use began, a presumption arises that the use was adverse and under a claim of right. [H.F.L.P., LLC v. City of Twin Falls, 339 P.3d 557 \(Idaho 2014\)](#).

[END OF SUPPLEMENT]

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Footnotes

- <sup>1</sup> [Platt v. Smith](#), 127 N.Y.S.2d 66 (Sup 1954); [Hillard v. Marshall](#), 888 P.2d 1255 (Wyo. 1995).
- <sup>2</sup> [Vrana v. Stuart](#), 169 Neb. 430, 99 N.W.2d 770 (1959); [Springer v. Durette](#), 217 Or. 196, 342 P.2d 132 (1959).
- <sup>3</sup> [Wareing v. Schreckendgust](#), 280 Mont. 196, 930 P.2d 37 (1996); [Porter v. Marx](#), 179 A.D.2d 962, 579 N.Y.S.2d 219 (3d Dep't 1992).
- <sup>4</sup> [Kusmierz v. Baan](#), 144 A.D.2d 829, 534 N.Y.S.2d 786 (3d Dep't 1988).
- <sup>5</sup> [Stryker v. Rasch](#), 57 Wyo. 34, 112 P.2d 570, 136 A.L.R. 770 (1941).
- <sup>6</sup> [Greenwalt Family Trust v. Kehler](#), 267 Mont. 508, 885 P.2d 421 (1994).  
As to presumptions, see § 288.

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#### B. Evidence

#### 2. Presumptions and Inferences

## § 288. Generally

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If the initial possession of land by a stranger is by permission, it is presumed to so continue until the contrary appears.<sup>1</sup>When the land is wild and uncultivated, one state applies the rule that open and continuous use for the requisite length of time raises a rebuttable presumption that the use was permissive for purposes of adverse possession.<sup>2</sup>A casual rather than customary use of vacant, unenclosed, unimproved land may be presumed to be permissive rather than adverse.<sup>3</sup>

Acts of possession by a cotenant are presumed to be done consistently with the title of the other cotenant and not adversely, and thus, the burden of proving hostile and notorious possession against a cotenant is much greater than against one who is not a cotenant.<sup>4</sup>When a coterminous owner builds a fence as a dividing line and occupies and claims to it as such, with knowledge of the other, the claim of the former is presumptively hostile and possession adverse.<sup>5</sup>In some jurisdictions, there is a presumption of permissiveness for adverse claimants with a familial relationship to the true owner.<sup>6</sup>However, in other jurisdictions, no presumption exists that a close family membership between claimants to property renders prior use of that property permissive and thus insufficient to support an adverse possession claim. While evidence of a familial relationship may sometimes assist the fact finder in determining the individual nature of the relationship between the claimants, or to whose benefit the property was used, standing alone, a familial relationship neither puts an end to the inquiry regarding permissive use nor shifts the burden of proof.<sup>7</sup>

Property that is held in fee simple ownership by municipalities must be presumed to be held for public use, and the party seeking title by adverse possession must bear the burden of rebutting that presumption.<sup>8</sup>

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### Footnotes

<sup>1</sup> [Pioneer Mill Co., Ltd. v. Dow](#), 90 Haw. 289, 978 P.2d 727 (1999), as amended on denial of reconsideration, (May 11,

1999) and as corrected, (June 13, 2006); *Hoverson v. Hoverson*, 216 Minn. 228, 12 N.W.2d 501 (1943); *Edgell v. Canning*, 1999 UT 21, 976 P.2d 1193 (Utah 1999).

<sup>2</sup> *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232 (Me. 2000).

<sup>3</sup> *Plaza v. Flak*, 7 N.J. 215, 81 A.2d 137, 27 A.L.R.2d 324 (1951).

<sup>4</sup> *Mackinac Island Development Co., Ltd. v. Burton Abstract and Title Co.*, 132 Mich. App. 504, 349 N.W.2d 191 (1984); *M & B Realty, Inc. v. Duval*, 767 A.2d 60 (R.I. 2001).  
As to the burden of proof, generally, see §§ 285 to 287.

<sup>5</sup> *Garringer v. Wingard*, 585 So. 2d 898 (Ala. 1991).

<sup>6</sup> *Pioneer Mill Co., Ltd. v. Dow*, 90 Haw. 289, 978 P.2d 727 (1999), as amended on denial of reconsideration, (May 11, 1999) and as corrected, (June 13, 2006); *Ransom v. Bebernitz*, 172 Vt. 423, 782 A.2d 1155 (2001).

<sup>7</sup> *Totman v. Malloy*, 431 Mass. 143, 725 N.E.2d 1045 (2000).

<sup>8</sup> *American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 215 Conn. 68, 574 A.2d 796 (1990).  
As to adverse possession of municipal property, see § 259.

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##### B. Evidence

##### 2. Presumptions and Inferences

## § 289. In favor of record owner

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The law presumes possession is under regular title.<sup>1</sup> Every presumption is in favor of the holder of legal title.<sup>2</sup> Every reasonable presumption is made in favor of the true owner as against adverse possession.<sup>3</sup> Thus, one having the record title to real property is presumed to have possession of such property until something occurs to show otherwise.<sup>4</sup> It is presumed that the use of land by one who has record title is the exercise of his or her right to enjoy it, and such use interrupts the continuity of adverse possession by another.<sup>5</sup>

That all reasonable presumptions are made in favor of the true owner in case of a claim by adverse possession also includes the presumption that the actual possession is subordinate to the right of the true owner.<sup>6</sup> The occupation of property by another than the record titleholder is deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal title for the statutory period.<sup>7</sup> Thus, the mere possession of land is not prima facie adverse to the title of the true owner given that all presumptions and intendments are favorable to the title, and possessions are not presumed to be hostile but rather in subordination to it.<sup>8</sup>

If the use of the property of another was permissive in the beginning, that use can be changed into hostile and adverse use only by the most unequivocal conduct of the user; evidence of adverse use must be strictly construed against the adverse user, and every reasonable intendment should be made in favor of true owner.<sup>9</sup> Thus, where the legal titleholder is operating on the assumption that one living on its land is doing so with its permission, and does not interfere with that occupancy, it would be manifestly unjust to allow occupancy to ripen into an ownership interest by adverse possession through the silence or inaction of the occupant; presumptions are in favor of the legal titleholder, and though they may be overcome, the claimant must produce evidence which will overcome them.<sup>10</sup>

#### CUMULATIVE SUPPLEMENT

**Cases:**

When assessing an adverse possession claim, the court must make all reasonable presumptions in favor of the true owner, including the presumption that actual possession is subordinate to the right of the true owner. [W.S.A. 893.25](#). [Wilcox v. Estate of Hines](#), 2014 WI 60, 849 N.W.2d 280 (Wis. 2014).

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**Footnotes**

- <sup>1</sup> [Louisa County Conservation Bd. v. Malone](#), 778 N.W.2d 204 (Iowa Ct. App. 2009).
- <sup>2</sup> [Cousins v. McNeel](#), 62 So. 3d 1039 (Ala. Civ. App. 2010); [Koch v. Packard](#), 48 Kan. App. 2d 281, 294 P.3d 338 (2012); [Akin v. Castleberry](#), 2012 OK 79, 286 P.3d 638 (Okla. 2012); [Foust v. Metcalf](#), 338 S.W.3d 457 (Tenn. Ct. App. 2010).
- <sup>3</sup> [Beaver Creek Ranch, L.P. v. Gordman Leverich Ltd. Liability Ltd. Partnership](#), 226 P.3d 1155 (Colo. App. 2009); [Roberts v. Walker](#), 238 Iowa 1330, 30 N.W.2d 314 (1947); [Mooney v. Canter](#), 311 S.W.2d 1 (Mo. 1958); [Copenhaver v. Copenhaver](#), 1957 OK 215, 317 P.2d 756 (Okla. 1957); [Lynch v. Lynch](#), 236 S.C. 612, 115 S.E.2d 301 (1960); [Peter H. and Barbara J. Steuck Living Trust v. Easley](#), 2010 WI App 74, 325 Wis. 2d 455, 785 N.W.2d 631 (Ct. App. 2010).  
In an adverse possession claim, there is a presumption that the record owner of wild and vacant land is the actual owner. [Shanks v. Honse](#), 364 S.W.3d 809 (Mo. Ct. App. S.D. 2012).
- <sup>4</sup> [C.H. Moore Trust Estate by Warner v. City of Storm Lake](#), 423 N.W.2d 13 (Iowa 1988); [Meyers v. Canutt](#), 242 Iowa 692, 46 N.W.2d 72, 24 A.L.R.2d 1 (1951); [Triplett v. David H. Fulstone Co.](#), 109 Nev. 216, 849 P.2d 334 (1993); [Schultz v. Dew](#), 1997 SD 72, 564 N.W.2d 320 (S.D. 1997).
- <sup>5</sup> [Harlow v. Miller](#), 147 Vt. 480, 520 A.2d 995 (1986).
- <sup>6</sup> [Roberts v. Walker](#), 238 Iowa 1330, 30 N.W.2d 314 (1947); [Androkites v. White](#), 2010 ME 133, 10 A.3d 677 (Me. 2010); [Mooney v. Canter](#), 311 S.W.2d 1 (Mo. 1958); [Copenhaver v. Copenhaver](#), 1957 OK 215, 317 P.2d 756 (Okla. 1957); [Hoffman v. Freeman Land and Timber, LLC.](#), 329 Or. 554, 994 P.2d 106 (1999); [Lynch v. Lynch](#), 236 S.C. 612, 115 S.E.2d 301 (1960); [Allie v. Russo](#), 88 Wis. 2d 334, 276 N.W.2d 730 (1979).
- <sup>7</sup> [Holen v. Phelps](#), 131 Mont. 146, 308 P.2d 624 (1957).
- <sup>8</sup> [Stewart v. Childress](#), 269 Ala. 87, 111 So. 2d 8 (1959); [Van Meter v. Kelsey](#), 91 So. 2d 327 (Fla. 1956); [Walter v. Jones](#), 15 Ill. 2d 220, 154 N.E.2d 250 (1958).
- <sup>9</sup> [Mielke v. Daly Ditches Irr. Dist.](#), 225 Mont. 172, 731 P.2d 927 (1987).
- <sup>10</sup> [Mary Moody Northen, Inc. v. Bailey](#), 244 Va. 118, 418 S.E.2d 882 (1992).

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##### B. Evidence

##### 2. Presumptions and Inferences

## § 290. In favor of adverse claimant

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#### A.L.R. Library

[Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843](#)

Ordinarily, presumptions cannot be indulged in support of a claim of adverse possession.<sup>1</sup> However, where it is shown that an adverse claimant has used the land as an owner would use it, or that the possession has been open, notorious, and continuous for the statutory period, a presumption or inference of a hostile holding by the claimant may arise<sup>2</sup> even where the possession was taken under a mistake as to, or in ignorance of, the true boundary line.<sup>3</sup> In other words, once the prima facie case of adverse possession has been made, the presumption shifts in favor of the adverse user's title, and the burden shifts to the other party to show that such use was permissive rather than adverse.<sup>4</sup>

A claim of right will be presumed from the assertion of dominion, particularly where the assertion of dominion is made by the erection of valuable improvements.<sup>5</sup> In the absence of any explanation whatsoever, where one is shown to have been for the statutory period in actual, open, notorious, continuous, and exclusive possession, apparently as owner, and such possession is unexplained, either by showing that it was under a lease from or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile.<sup>6</sup> While possession under a statute of limitations, in the absence of evidence to the contrary qualifying and explaining the possession, may raise a presumption or inference that it is adverse and hostile, the proof establishing the possession must itself be consistent with a hostile claim of ownership in order to support such a presumption.<sup>7</sup>

Good faith may be presumed from an open, exclusive, continuous, hostile possession<sup>8</sup> or from the payment of money for color of title and taxes by a person who acts as though the owner of the property.<sup>9</sup> Good faith may be presumed from entry under a recorded deed<sup>10</sup> or when there is no evidence that the claim of possession originated in fraud.<sup>11</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

For purposes of an adverse possession claim, upon unexplained, exclusive, continuous occupancy of land under a chain of title, by one not the true owner, for the statutory period there arises the presumption that, during all such period, the possession had all the requisites of an adverse holding, subject to be rebutted by proof that it was in fact subordinate to the right of the true owner, but conclusive in the absence of such rebuttal. [W.S.A. 893.25](#). [Wilcox v. Estate of Hines](#), 2014 WI 60, 849 N.W.2d 280 (Wis. 2014).

## [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [Kilpatrick v. Gulf Production Co.](#), 139 S.W.2d 653 (Tex. Civ. App. Beaumont 1940), writ dismissed, judgment correct.
- <sup>2</sup> [Vrana v. Stuart](#), 169 Neb. 430, 99 N.W.2d 770 (1959); [Platt v. Smith](#), 127 N.Y.S.2d 66 (Sup 1954); [Drayton v. City of Lincoln City](#), 244 Or. App. 144, 260 P.3d 642 (2011); [Costa v. Silva](#), 996 A.2d 607 (R.I. 2010); [Harvey v. Peters](#), 227 S.W.2d 867 (Tex. Civ. App. Fort Worth 1950); [Helm v. Clark](#), 2010 WY 168, 244 P.3d 1052 (Wyo. 2010).
- <sup>3</sup> [Dubois v. Karazin](#), 315 Mich. 598, 24 N.W.2d 414 (1946); [Meyer v. Ellis](#), 411 P.2d 338 (Wyo. 1966).
- <sup>4</sup> [Meadow Lake Estates Homeowners Ass'n v. Shoemaker](#), 2008 MT 41, 341 Mont. 345, 178 P.3d 81 (2008).
- <sup>5</sup> [Childs v. Sammons](#), 272 Ga. 737, 534 S.E.2d 409 (2000).
- <sup>6</sup> [Pioneer Mill Co., Ltd. v. Dow](#), 90 Haw. 289, 978 P.2d 727 (1999), as amended on denial of reconsideration, (May 11, 1999) and as corrected, (June 13, 2006).
- <sup>7</sup> [Gilbert v. Green](#), 150 Tex. 521, 242 S.W.2d 879 (1951).
- <sup>8</sup> [Dupuy v. Shannon](#), 136 So. 2d 111 (La. Ct. App. 3d Cir. 1961).
- <sup>9</sup> [Bergesen v. Clauss](#), 15 Ill. 2d 337, 155 N.E.2d 20, 68 A.L.R.2d 446 (1958).
- <sup>10</sup> [Thurmond v. Espalin](#), 50 N.M. 109, 171 P.2d 325 (1946).
- <sup>11</sup> [Childs v. Sammons](#), 272 Ga. 737, 534 S.E.2d 409 (2000).

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### Adverse Possession

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### B. Evidence

#### 3. Admissibility of Evidence

## § 291. Generally

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### West's Key Number Digest

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### Forms

Forms relating to affidavits, generally, see Am. Jur. Legal Forms 2d, Adverse Possession; Am. Jur. Pleading and Practice Forms, Adverse Possession [[Westlaw® Search Query](#)]

The admissibility of evidence as to adverse possession follows the general rules applicable to civil cases.<sup>1</sup> Relevant evidence includes that evidence showing the constituent elements of title by adverse possession, including facts tending to prove such acts of dominion on the part of the claimant as would singly or collectively put all persons, and particularly the true owner, on notice of the fact that the property in question is in the adverse possession of the claimant.<sup>2</sup> The introduction of extrinsic evidence to cure a deficiency in a deed description so as to establish adverse possession under color of title is governed by evidentiary and not substantive rules of law.<sup>3</sup>

Anyone possessing personal knowledge of the ownership or use of real property is competent to testify on the issue of the adverse use of that property,<sup>4</sup> regardless of whether they are in privity with the party claiming adverse possession,<sup>5</sup> and including tenants or agents who may testify as to the extent of a party's understanding as to boundaries of the subject property.<sup>6</sup>

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### Footnotes

§ 291. Generally, 3 Am. Jur. 2d Adverse Possession § 291

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<sup>1</sup> Turney v. Sousa, 146 Cal. App. 2d 787, 304 P.2d 1025 (1st Dist. 1956).

<sup>2</sup> Stiff v. Cobb, 126 Ala. 381, 28 So. 402 (1900); Horton v. Smith-Richardson Inv. Co., 81 Fla. 255, 87 So. 905 (1921); Ater v. Smith, 245 Ill. 57, 91 N.E. 776 (1910); Weeks v. Morin, 85 N.H. 9, 153 A. 471 (1931).

<sup>3</sup> Williams v. Howell, 108 N.M. 225, 770 P.2d 870 (1989).

<sup>4</sup> Caywood v. Department of Natural Resources, 71 Mich. App. 322, 248 N.W.2d 253 (1976); Lyman v. Ferrari, 66 Ohio App. 2d 72, 20 Ohio Op. 3d 138, 419 N.E.2d 1112 (1st Dist. Hamilton County 1979).

<sup>5</sup> Caywood v. Department of Natural Resources, 71 Mich. App. 322, 248 N.W.2d 253 (1976).

<sup>6</sup> King v. Inwood North Associates, 563 S.W.2d 309 (Tex. Civ. App. Houston 1st Dist. 1978).

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#### A.L.R. Library

[Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843](#)

Generally, evidence of the acts and declarations of the claimant or predecessors in possession, during the statutory period, is admissible to show the nature of possession<sup>1</sup> or to show the character of the right asserted.<sup>2</sup> While the declarations of the adverse claimant are admissible to prove the character of possession otherwise proved or admitted, such declarations are inadmissible to prove possession itself.<sup>3</sup> Evidence of use is admissible to prove adverse possession because it is ordinarily an indication of possession.<sup>4</sup>

The payment of taxes is evidence of an adverse possession,<sup>5</sup> while the failure to pay taxes may be evidence that the claimant did not claim title,<sup>6</sup> so in proving a claim of title by adverse possession, it is competent in some cases to introduce evidence showing the payment of taxes by the claimant on the property involved for all, or a part, of the time it was in the claimant's possession.<sup>7</sup> Where, however, the record is not clear regarding the land on which the claimant has paid taxes, the claimant may fail to prove adverse possession.<sup>8</sup> The payment of taxes is not, however, sufficient to establish adverse possession as a matter of law.<sup>9</sup>

Continuous occupation of property for five years creates a presumption that the possession has been adverse and under a claim of right.<sup>10</sup> Cultivation of property, or changing the nature and appearance thereof, may be evidence supporting acts of actual possession,<sup>11</sup> including the planting and harvesting of trees<sup>12</sup> or the plowing and maintaining of firebreaks.<sup>13</sup> However,

without a showing of the length of time of the operations and their location, the conduct of cattle and timber operations fails to establish adverse possession.<sup>14</sup> Similarly, evidence of such cultivation that falls short of showing the cultivation was visible and evident to the public may be too vague to establish actual, open, notorious, and continuous possession necessary to a prima facie case of adverse possession.<sup>15</sup>

Declarations or admissions of one in possession tending to show that the possessor had no title or did not claim title, whether the possession was or was not by permission of the true owner, are admissible evidence that the possession was not adverse.<sup>16</sup> Documentary evidence may be introduced to show actual possession<sup>17</sup> which may include photographs showing the nature of the claimant's use of the property.<sup>18</sup> The enclosure of property is admissible evidence supporting adverse possession,<sup>19</sup> as is evidence of adding to and maintaining fences, along with use of land up to the fence,<sup>20</sup> or in conjunction with other acts consistent with actual possession and use of the property.<sup>21</sup>

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#### Footnotes

- <sup>1</sup> Richterberg v. Wittich Memorial Church, 222 F. Supp. 324 (W.D. Okla. 1963), judgment aff'd, 334 F.2d 869 (10th Cir. 1964); Park Const. Realty & Securities Corporation v. Emmett, 145 Kan. 604, 66 P.2d 379 (1937); Stephens v. Fowlkes, 338 Mo. 527, 92 S.W.2d 617 (1936); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964); Lamons v. Mathes, 33 Tenn. App. 609, 232 S.W.2d 558 (1950).
- <sup>2</sup> Cleveland v. Hensley, 548 S.W.2d 473 (Tex. Civ. App. Texarkana 1977).
- <sup>3</sup> Turney v. Sousa, 146 Cal. App. 2d 787, 304 P.2d 1025 (1st Dist. 1956).
- <sup>4</sup> Huber v. Cardiff, 186 Ohio App. 3d 384, 2009-Ohio-3433, 928 N.E.2d 742 (2d Dist. Miami County 2009).
- <sup>5</sup> Yamashita v. People of Territory of Guam, 59 F.3d 114 (9th Cir. 1995); Armstrong v. Dailey, 514 So. 2d 993 (Ala. 1987); Nennemann v. Rebuck, 242 Neb. 604, 496 N.W.2d 467 (1993); Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992); Rhodes v. Cahill, 802 S.W.2d 643 (Tex. 1990); Maynard v. Hibble, 244 Va. 94, 418 S.E.2d 871 (1992).
- <sup>6</sup> United Park City Mines Co. v. Estate of Clegg, 737 P.2d 173 (Utah 1987).
- <sup>7</sup> Faulks v. Schrider, 114 F.2d 587 (App. D.C. 1940); McCary v. Crumpton, 267 Ala. 484, 103 So. 2d 714 (1958); DeChambeau v. Estate of Smith, 132 Idaho 568, 976 P.2d 922 (1999); Bailey v. Karnopp, 170 Neb. 836, 104 N.W.2d 417 (1960); Corbett v. Corbett, 249 N.C. 585, 107 S.E.2d 165 (1959); Knecht v. Spake, 218 Or. 601, 346 P.2d 98 (1959).
- <sup>8</sup> Baxter v. Craney, 135 Idaho 166, 16 P.3d 263 (2000); Tester v. Tester, 300 Mont. 5, 3 P.3d 109 (2000).
- <sup>9</sup> Rhodes v. Cahill, 802 S.W.2d 643 (Tex. 1990).
- <sup>10</sup> Cluff v. Bonner County, 121 Idaho 184, 824 P.2d 115 (1992).
- <sup>11</sup> Williamson v. Fain, 274 Ga. 413, 554 S.E.2d 175 (2001); Maynard v. Hibble, 244 Va. 94, 418 S.E.2d 871 (1992).
- <sup>12</sup> Brown v. Williams, 259 Ga. 6, 375 S.E.2d 835 (1989); Lewis v. Aslesen, 2001 SD 131, 635 N.W.2d 744 (S.D. 2001).
- <sup>13</sup> Brown v. Williams, 259 Ga. 6, 375 S.E.2d 835 (1989).
- <sup>14</sup> Gilbert v. Summers, 240 Va. 155, 393 S.E.2d 213 (1990).
- <sup>15</sup> Morinoue v. Roy, 86 Haw. 76, 947 P.2d 944 (1997).
- <sup>16</sup> White v. Williams, 260 Ala. 182, 69 So. 2d 847 (1954); Archuleta v. Rose, 136 Colo. 211, 315 P.2d 201 (1957).
- <sup>17</sup> Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997).

- <sup>18</sup> Striefel v. Charles-Keyt-Leaman Partnership, 1999 ME 111, 733 A.2d 984 (Me. 1999).
- <sup>19</sup> Lindgren v. Martin, 130 Idaho 854, 949 P.2d 1061 (1997).
- <sup>20</sup> Kendall v. Selvaggio, 413 Mass. 619, 602 N.E.2d 206 (1992); Stallings v. Bailey, 558 So. 2d 858 (Miss. 1990); Lewis v. Moorhead, 522 N.W.2d 1 (S.D. 1994) (even though the fence did not run the full length of the disputed area).
- <sup>21</sup> Roy v. Kayser, 501 So. 2d 1110 (Miss. 1987).

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##### 3. Admissibility of Evidence

### § 293. Acts and declarations of adverse claimant and predecessors after expiration of statutory period

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#### West's Key Number Digest

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While acts or conversations of the claimant or a predecessor after the expiration of the statutory period and recognizing the title of the original owner are not admissible for the purpose of divesting title held by the adverse occupant and revesting it in the original owner, such evidence is admissible for the purpose of showing that the possession of the occupant was not adverse and that the occupant did not acquire title by the possession, which was only permissive.<sup>1</sup> Thus, where the possession was taken under mistake or ignorance as to the true boundary line, evidence of acts or statements occurring after the running of the statutory period may be admissible to show that there was no intent to hold adversely during the running of the period.<sup>2</sup>

Evidence that a claimant thought that he or she was supposed to pay something for the property and that he or she was willing to do so may be introduced to defeat a claim of adverse possession.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Lowe v. Cox](#), 210 Ark. 169, 194 S.W.2d 892 (1946); [Maloney v. Bedford](#), 290 Ky. 647, 162 S.W.2d 198 (1942).

<sup>2</sup> [Davis v. Wright](#), 220 Ark. 743, 249 S.W.2d 979 (1952); [Deweese v. Logue](#), 208 Ark. 79, 185 S.W.2d 85 (1945).

<sup>3</sup> [Gonthier v. Horne](#), 576 A.2d 745 (Me. 1990).



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#### B. Evidence

#### 3. Admissibility of Evidence

## § 294. Reputation as to ownership or claim of ownership

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  113

The adverse claimant may introduce evidence of reputed ownership to show that the claim was open and notorious<sup>1</sup> or for the purpose of showing the hostility of the claimant's possession.<sup>2</sup> However, evidence of general reputation as to the ownership or claim of title to land is generally inadmissible for the purpose of showing the acquisition or existence of title thereto by adverse possession.<sup>3</sup> Evidence of the reputed ownership by the claimant of the land in controversy is not admissible to show the element of actual possession.<sup>4</sup>

Parties claiming the record title ordinarily may show a reputed title in themselves and their predecessors in title, including where such evidence may tend to show the absence of notoriety of the adverse claim and of the record owner's knowledge thereof.<sup>5</sup>

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### Footnotes

<sup>1</sup> Walker v. Town of Fruithurst, 272 Ala. 141, 130 So. 2d 12 (1961); International Harvester Co. of America v. Myers, 86 Kan. 497, 121 P. 500 (1912); Spicer v. Spicer, 249 Mo. 582, 155 S.W. 832 (1913); Brewer v. Brewer, 238 N.C. 607, 78 S.E.2d 719, 40 A.L.R.2d 763 (1953).

<sup>2</sup> Watters v. Brown, 177 Ala. 78, 58 So. 291 (1912); Northern Pac. Ry. Co. v. City of Spokane, 45 Wash. 229, 88 P. 135 (1907).

<sup>3</sup> Brewer v. Brewer, 238 N.C. 607, 78 S.E.2d 719, 40 A.L.R.2d 763 (1953).

<sup>4</sup> Williams v. Lyon, 181 Ala. 531, 61 So. 299 (1913); Luttrell v. Whitehead, 121 Ga. 699, 49 S.E. 691 (1905).

<sup>5</sup> [Spicer v. Spicer, 249 Mo. 582, 155 S.W. 832 \(1913\).](#)

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##### 4. Weight and Sufficiency

## § 295. Generally; standard of proof

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#### West's Key Number Digest

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Title by adverse possession cannot be made out by inference; generally, it must be established by clear and positive proof,<sup>1</sup> or by clear and convincing evidence,<sup>2</sup> or by clear and satisfactory evidence,<sup>3</sup> or by clear and cogent proof,<sup>4</sup> or by clear and unequivocal evidence.<sup>5</sup> Some cases hold that it may be established by a preponderance of the evidence<sup>6</sup> or of the credible evidence.<sup>7</sup> A greater showing must be made to establish an adverse possession than is necessary to establish a prescriptive easement.<sup>8</sup>

It has been held that there is no hard and fast rule by which the sufficiency of an adverse claim may be determined for purposes of a cotenant's adverse possession claim against other cotenants; courts generally look to the totality of the circumstances and consider such factors as the relationship of the parties, their reasonable access to the property, kinship, and numerous other factors to determine if nonpossessory cotenants have been given sufficient warning that the status of a cotenant in possession has shifted from mutuality to hostility.<sup>9</sup> When establishing title by adverse possession, evidence of actual possession must be sufficient to alert a reasonably diligent owner to the adverse possessor's exercise of dominion and control.<sup>10</sup> Evidence may be sufficient to support adverse possession even though conflicting evidence is introduced.<sup>11</sup> A deed or color of title, where one exists, purporting to convey an interest in property subject to an adverse possession claim is evidence of a claim of right, but even that evidence can be overcome by acts or statements indicating that the claimant intends to claim more or less than the claimant's deed purports to convey.<sup>12</sup>

In determining whether the character of the possession was hostile, where the possession of land was taken under mistake or ignorance as to the true boundary, evidence of statements indicating a lack of intent to claim the land adversely has in some cases been held entitled to great, if not conclusive, weight<sup>13</sup> and in other cases to little weight.<sup>14</sup> Where an intent to claim title element of adverse possession is required in a case involving possession under a mistaken belief as to the true boundary, proof of such an element is not met if the party had conscious doubt concerning the state of title.<sup>15</sup> Record title is the highest evidence of ownership and, while such title may be defeated by adverse possession, mere possession is the lowest evidence of ownership.<sup>16</sup>



## CUMULATIVE SUPPLEMENT

### Cases:

Under Iowa law, proof of elements of adverse possession claim must be clear and positive. [McClurg Family Farm, LLC v. United States](#), 115 Fed. Cl. 1 (2014).

The claimant has the burden of proving each of the elements of an adverse possession claim by a preponderance of the evidence, and the Supreme Judicial Court will uphold a determination that a claimant established each element of adverse possession if supported by credible evidence in the record. [Harvey v. Furrow](#), 2014 ME 149, 107 A.3d 604 (Me. 2014).

Northern property owners established they had acquired title to property via adverse possession by clear and convincing evidence; northern property owners treated the disputed tract of property as their own and ran cattle, rode horses, hunted, fished, camped, and planted grass on the disputed property from 1987 until 2015, their use was uninterrupted and without the consent of the then-title owners, and their use was open, notorious, and visible. [Miss. Code Ann. § 15-1-13\(1\)](#). [Revette v. Ferguson](#), 271 So. 3d 702 (Miss. Ct. App. 2018).

Satellite images of disputed property did not establish clear and convincing evidence of neighboring landowner's adverse possession through his exclusive possession that was hostile, open, notorious, continuous, and adverse in action for quiet title; satellite images did not depict the disputed property as it existed in 1996, the required 21 years before neighboring landowner's complaint to quiet title by means of adverse possession was filed, and the satellite images jump in time from 1994 to 2000. [Jones v. Global Annex, LLC](#), 2019-Ohio-2083, 136 N.E.3d 765 (Ohio Ct. App. 12th Dist. Fayette County 2019), appeal not allowed, 157 Ohio St. 3d 1427, 2019-Ohio-4003, 131 N.E.3d 969 (2019).

Property owner established that her possession of adjoining land was exclusive, in support of her claim of adverse possession; owner averred that adjoining land had been a fenced part of her land for more than 21 years, neighbor averred the same, and no other evidence existed that other individuals claimed title to adjoining land during time that it was a fenced part of owner's land. [Greene v. Partridge](#), 2016-Ohio-8475, 78 N.E.3d 197 (Ohio Ct. App. 4th Dist. Highland County 2016).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> [Weyerhaeuser Co. v. Brantley](#), 510 F.3d 1256 (10th Cir. 2007); [Rogers v. U.S.](#), 107 Fed. Cl. 387 (2012) (applying Florida law); [Turnipseed v. Moseley](#), 248 Ala. 340, 27 So. 2d 483, 170 A.L.R. 882 (1946); [O'Connor v. Larocque](#), 302 Conn. 562, 31 A.3d 1 (2011); [Van Meter v. Kelsey](#), 91 So. 2d 327 (Fla. 1956); [Pioneer Mill Co., Ltd. v. Dow](#), 90 Haw. 289, 978 P.2d 727 (1999), as amended on denial of reconsideration, (May 11, 1999) and as corrected, (June 13, 2006); [Schramm v. Schramm](#), 13 Ill. 2d 281, 148 N.E.2d 799 (1958); [Louisa County Conservation Bd. v. Malone](#), 778 N.W.2d 204 (Iowa Ct. App. 2009); [Burns v. Foster](#), 348 Mich. 8, 81 N.W.2d 386 (1957); [Hoverson v. Hoverson](#), 216 Minn. 228, 12 N.W.2d 501 (1943); [Kessinger v. Matulevich](#), 278 Mont. 450, 925 P.2d 864 (1996); [Birtrong v. Coronado Bldg. Corp.](#), 90 N.M. 670, 568 P.2d 196 (1977); [Van Valkenburgh v. Lutz](#), 304 N.Y. 95, 106 N.E.2d 28 (1952); [Akin v. Castleberry](#), 2012 OK 79, 286 P.3d 638 (Okla. 2012); [Fry v. Woodward](#), 221 Or. 39, 350 P.2d 183 (1960); [Cuka v. Jamesville Hutterian Mut. Soc.](#), 294 N.W.2d 419 (S.D. 1980); [Peter H. and Barbara J. Steuck Living Trust v. Easley](#), 2010 WI App 74, 325 Wis. 2d 455, 785 N.W.2d 631 (Ct. App. 2010).

As to presumptions and inferences, see §§ 288 to 290.

As to who has the burden of proof, generally, see § 286.

<sup>2</sup> [Cousins v. McNeel](#), 62 So. 3d 1039 (Ala. Civ. App. 2010); [Cowan v. Yeisley](#), 255 P.3d 966 (Alaska 2011); [Sears v. Catholic Archdiocese of Washington](#), 5 A.3d 653 (D.C. 2010); [East Lizard Butte Water Corp. v. Howell](#), 122 Idaho

679, 837 P.2d 805 (1992); *Knauff v. Hovermale*, 976 N.E.2d 1267 (Ind. Ct. App. 2012); *Wright v. Sourk*, 45 Kan. App. 2d 860, 258 P.3d 981 (2011), review denied, (Jan. 20, 2012); *Moore v. Stills*, 307 S.W.3d 71 (Ky. 2010), as corrected, (Apr. 7, 2010); *Gammon v. Verrill*, 651 A.2d 831 (Me. 1994); *Greenwood v. Young*, 80 So. 3d 140 (Miss. Ct. App. 2012); *Baston v. Baston*, 2010 MT 207, 357 Mont. 470, 240 P.3d 643 (2010); *Sjuts v. Granville Cemetary Ass'n*, 272 Neb. 103, 719 N.W.2d 236 (2006); *Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 945 N.Y.S.2d 196, 968 N.E.2d 433 (2012); *Evanich v. Bridge*, 119 Ohio St. 3d 260, 2008-Ohio-3820, 893 N.E.2d 481 (2008); *Case v. Burton*, 250 Or. App. 14, 279 P.3d 259 (2012); *Cahill v. Morrow*, 11 A.3d 82 (R.I. 2011); *Dawkins v. Mozie*, 399 S.C. 290, 731 S.E.2d 342 (Ct. App. 2012); *Lewis v. Aslesen*, 2001 SD 131, 635 N.W.2d 744 (S.D. 2001); *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366 (Tenn. 2007); *Harkleroad v. Linkous*, 281 Va. 12, 704 S.E.2d 381 (2011); *Brown v. Gobble*, 196 W. Va. 559, 474 S.E.2d 489 (1996) (holding that a preponderance of the evidence is not sufficient).

3 *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000).

4 *Beach v. Township of Lima*, 489 Mich. 99, 802 N.W.2d 1 (2011).

5 *Davidson v. Perry*, 386 Ill. App. 3d 821, 325 Ill. Dec. 738, 898 N.E.2d 785 (4th Dist. 2008).

6 *Burns v. Owen*, 235 Ark. 203, 357 S.W.2d 520 (1962); *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006); *State v. Phillips*, 400 A.2d 299 (Del. Ch. 1979), judgment aff'd, 449 A.2d 250 (Del. 1982); *Weinstein v. Hurlbert*, 2012 ME 84, 45 A.3d 743 (Me. 2012); *Shanks v. Honse*, 364 S.W.3d 809 (Mo. Ct. App. S.D. 2012); *Saunders v. Rebuck*, 242 Neb. 610, 496 N.W.2d 472 (1993); *Kazmir v. Benavides*, 288 S.W.3d 557 (Tex. App. Houston 14th Dist. 2009); *Nickell v. Southview Homeowners Ass'n*, 167 Wash. App. 42, 271 P.3d 973 (Div. 2 2012), review denied, 174 Wash. 2d 1018, 282 P.3d 96 (2012).

7 *Hamburg Realty Co. v. Woods*, 327 S.W.2d 138 (Mo. 1959).

8 *Moran v. Edman*, 194 W. Va. 342, 460 S.E.2d 477 (1995) (overruled on other grounds by, *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010)).

9 *Sherman v. Wallace*, 88 Ark. App. 229, 197 S.W.3d 10 (2004).

10 *Vezey v. Green*, 35 P.3d 14 (Alaska 2001).

11 *Lawrence v. Pelletier*, 154 Vt. 29, 572 A.2d 936 (1990).

12 *Hoffman v. Freeman Land and Timber, LLC.*, 329 Or. 554, 994 P.2d 106 (1999).

13 *Waters v. Madden*, 197 Ark. 380, 122 S.W.2d 554 (1938); *Patrick v. Cheney*, 226 Iowa 853, 285 N.W. 184 (1939); *Ennis v. Stanley*, 346 Mich. 296, 78 N.W.2d 114 (1956).

14 *Gathings v. Johns*, 216 Ark. 668, 226 S.W.2d 978 (1950); *Patterson v. Wilmont*, 245 S.W.2d 116 (Mo. 1952); *Konop v. Knobel*, 167 Neb. 318, 92 N.W.2d 714 (1958).

15 *Sebrell v. Carter*, 105 N.C. App. 322, 413 S.E.2d 1 (1992).

16 *Estate of Mark v. H.H. Smith Co.*, 547 N.E.2d 796 (Ind. 1989).

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##### B. Evidence

##### 4. Weight and Sufficiency

## § 296. Particular evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  27, 33, 38, 57, 85, 114(2), 114(3)

#### A.L.R. Library

[Grazing of livestock, gathering of natural crop, or cutting of timber by record owner as defeating exclusiveness or continuity of possession by one claiming title by adverse possession, 39 A.L.R.4th 1148](#)

[Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 A.L.R.3d 818](#)

Evidence has been sufficient to establish adverse possession by proof showing continuous maintenance of the property evidenced by mowing and removing trees,<sup>1</sup> by other evidence of regular cultivation and use,<sup>2</sup> by evidence of obvious use of the property for the statutory period combined with maintenance of the grounds and construction of a fence with a locked gate around the property,<sup>3</sup> and where claimants grazed their cattle on the subject property, built fences around the property, exclusively maintained the existing fences, and constructed other structures thereon and chased off persons entering the property without their permission.<sup>4</sup> Grazing horses and occasionally cutting grass may be sufficient evidence of open, notorious, hostile, continuous, and exclusive possession of disputed land.<sup>5</sup> Sufficient evidence of adverse possession may be shown by the making of improvements to the land by planting grass, trees, and flowers and by building a toolshed and installing a septic system below the ground<sup>6</sup> or showing that the property was used for storing farm equipment, pasturing livestock, hunting, and woodcutting.<sup>7</sup> Sufficient evidence of adverse possession may also be shown by the erection of a split-rail fence; installing raised planting beds composed of railroad ties, bushes, flowers, and at least one tree; installing sandstone blocks; and installing wrought iron fencing.<sup>8</sup>

The threshold for the legal sufficiency of physical acts as proof of possession for purposes of establishing title by adverse possession varies with the character of the land.<sup>9</sup> Thus, a seasonal use of the property may be sufficient evidence to support

adverse possession where the character of the property is such that seasonal use is consistent with a claimant continuously using the property as an average owner of similar property would use it.<sup>10</sup> However, occasional cultivation and other use may not be sufficient<sup>11</sup> such that evidence showing that use of the property consisting, at most, of maintaining a fence, and occasionally visiting to pick blackberries and to picnic, may fail to constitute actual, exclusive, open, notorious, and hostile possession necessary for adverse possession.<sup>12</sup> Recreational use is insufficient to raise a presumption of adverse use.<sup>13</sup> Where there is a familial relationship between opposing parties, the planting of trees is not sufficient evidence to establish an adverse possession.<sup>14</sup>

A partial construction of structures on the property may be insufficient evidence of adverse possession,<sup>15</sup> and evidence that another maintains part of the property may defeat a claim to the whole.<sup>16</sup> A claimant's mistaken belief that a fence on the disputed parcel of land was a boundary fence may not be sufficient to establish the claimant's adverse possession of the land,<sup>17</sup> and a fence that does not establish a boundary and is for the convenience of the parties implies permission<sup>18</sup> and will not be sufficient to support an adverse holding of the disputed land.<sup>19</sup>

The testimony of the record owner that permission had been given to the claimants may be sufficient to support a finding there was no adverse possession.<sup>20</sup>

Hostility, for purposes of an adverse possession claim, can be inferred simply from the existence of the remaining four elements of proof, thus shifting the burden to the record owner to produce evidence rebutting the presumption of adversity.<sup>21</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Alleged adverse possessors' use of the disputed property, which abutted a 20-foot-wide corridor for a private road, was hostile, as required to support a claim of adverse possession, despite argument that the possessors' use of the disputed property was consistent with easement rights; possessors' use was not limited to mere passage, but concerned maintaining lawns, caring for flowers, trees, and shrubs, installing irrigation systems and electric doc fences, and keeping driveways and mailboxes, and entity that had record title to the private road and disputed the claim of adverse possession paved the road up to the edges of the alleged adverse possessors' lawns, which reinforced the possessors' argument that they used the disputed property as part of their lawns and not as rights-of-way. 33 Me. Rev. Stat. § 458(2)(A). *Fissmer v. Smith*, 2019 ME 130, 214 A.3d 1054 (Me. 2019), as revised, (Sept. 20, 2019).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> *Bergen v. Dixon*, 527 So. 2d 1274 (Ala. 1988); *Woodrow v. Sisson*, 154 A.D.2d 829, 546 N.Y.S.2d 492 (3d Dep't 1989).

<sup>2</sup> *Williamson v. Fain*, 274 Ga. 413, 554 S.E.2d 175 (2001).

<sup>3</sup> *Golden Hammer Auto Body Corp. v. Consolidated Rail Corp.*, 151 A.D.2d 545, 542 N.Y.S.2d 320 (2d Dep't 1989).

<sup>4</sup> *Lewis v. Johnson*, 507 So. 2d 918 (Ala. 1987); *Robertson v. Dombroski*, 678 So. 2d 637 (Miss. 1996); *Butler v. De La Cruz*, 812 S.W.2d 422 (Tex. App. San Antonio 1991), writ denied, (Nov. 20, 1991).

<sup>5</sup> *Tillison v. Taylor*, 572 So. 2d 429 (Ala. 1990).

- 6 Fencl v. City of Harpers Ferry, 620 N.W.2d 808 (Iowa 2000).
- 7 Triplett v. David H. Fulstone Co., 109 Nev. 216, 849 P.2d 334 (1993).
- 8 Evanich v. Bridge, 170 Ohio App. 3d 653, 2007-Ohio-1349, 868 N.E.2d 747 (9th Dist. Lorain County 2007),  
judgment aff'd, 119 Ohio St. 3d 260, 2008-Ohio-3820, 893 N.E.2d 481 (2008).
- 9 Vezey v. Green, 35 P.3d 14 (Alaska 2001).
- 10 Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990).
- 11 Rawls v. Parker, 602 So. 2d 1164 (Miss. 1992).
- 12 Harmon v. Ingram, 572 So. 2d 411 (Ala. 1990).
- 13 Kessinger v. Matulevich, 278 Mont. 450, 925 P.2d 864 (1996).
- 14 Harlow v. Miller, 147 Vt. 480, 520 A.2d 995 (1986).
- 15 ITT Rayonier, Inc. v. Bell, 112 Wash. 2d 754, 774 P.2d 6 (1989).
- 16 Carney v. Heinson, 133 Idaho 275, 985 P.2d 1137 (1999).
- 17 Hovendick v. Ruby, 10 P.3d 1119 (Wyo. 2000).
- 18 Lake v. Severson, 993 P.2d 309 (Wyo. 1999).
- 19 Kimball v. Turner, 993 P.2d 303 (Wyo. 1999).
- 20 Cooper v. Cate, 591 So. 2d 68 (Ala. 1991).
- 21 Bratone v. Conforti-Brown, 79 A.D.3d 955, 913 N.Y.S.2d 762 (2d Dep't 2010).

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#### VI. Practice and Procedure

##### B. Evidence

##### 4. Weight and Sufficiency

## § 297. Adverse claimant's statement or admission as to intent to claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  114(1)

The claimant's declarations as to intent may support a finding of adverse possession.<sup>1</sup> However, an adverse claimant's testimony that he or she did not intend to claim more than his or her own is sufficient to preclude a claim of title by adverse possession.<sup>2</sup> It is not, however, necessary for a claimant to avow wrongdoing.<sup>3</sup> In arriving at the intent of the claimant, it is better for the court to weigh the reasonable import of the claimant's conduct in the years preceding the litigation rather than rely on a remark, made under the stress of trial, that is elsewhere refuted by the evidence.<sup>4</sup> A conversation during which the claimant informs the neighbor of the claimant's opinion as to the established property line does not evidence an intent to exclude the neighbor from use as required to satisfy the exclusive and hostile elements of an adverse possession claim.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Smith v. Hayden](#), 772 P.2d 47 (Colo. 1989).

<sup>2</sup> [Ogle v. Hodge](#), 217 Ark. 913, 234 S.W.2d 24 (1950); [Patrick v. Cheney](#), 226 Iowa 853, 285 N.W. 184 (1939); [Ennis v. Stanley](#), 346 Mich. 296, 78 N.W.2d 114 (1956); [Orlando v. Moore](#), 274 S.W.2d 86 (Tex. Civ. App. Waco 1954), writ refused n.r.e., (Apr. 6, 1955).

<sup>3</sup> [Schmidt v. Marschel](#), 211 Minn. 539, 2 N.W.2d 121 (1942).

<sup>4</sup> [Rindeikis v. Coffman](#), 231 Ark. 422, 329 S.W.2d 550 (1959); [Rye v. Baumann](#), 231 Ark. 278, 329 S.W.2d 161 (1959).

<sup>5</sup> [Rawls v. Parker](#), 602 So. 2d 1164 (Miss. 1992).

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### Research References

#### West's Key Number Digest

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## § 298. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  115 to 117

In actions for the recovery of land where either party relies on a title by adverse possession, and the evidence demands a finding that such title has ripened and thereby extinguished an inconsistent title to the land, the court is authorized to direct a verdict.<sup>1</sup> The only manner in which a claimant who brings an action to quiet title to property based on adverse possession can establish ownership is by proving the elements of adverse possession against all claimants.<sup>2</sup> Sufficient evidence of the time during which adverse acts took place must be introduced to support a claim of adverse possession.<sup>3</sup>

A claim of adverse possession is based upon an assertion of ownership rights as against all persons, not simply the record owner, and thus, it is not inconsistent for a jury to find adverse claimants to be in adverse possession and the opposing party to not be the record titleholder.<sup>4</sup> It is not necessary to show that all others were totally excluded from the property,<sup>5</sup> considering some hospitality is consistent with exclusive use.<sup>6</sup> Not sharing the parcel with the true owner or the world at large generally is sufficient.<sup>7</sup>

Actual notice to the true and rightful owner that the possession is adverse may not be necessary to prove where there was no evidence of permissive possession, and such possession was open.<sup>8</sup>

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#### Footnotes

<sup>1</sup> [Hearn v. Leverette](#), 213 Ga. 286, 99 S.E.2d 147 (1957); [Bordages v. Stanolind Oil & Gas Co.](#), 129 S.W.2d 786 (Tex. Civ. App. Galveston 1938), writ dismissed, judgment correct.

<sup>2</sup> [Cluff v. Bonner County](#), 126 Idaho 950, 895 P.2d 551 (1995).

<sup>3</sup> [Morinoue v. Roy](#), 86 Haw. 76, 947 P.2d 944 (1997).  
As to the duration of possession as a necessary element, see [§ 12](#).

<sup>4</sup> Lake Drive Corp. v. Portner, 108 N.C. App. 100, 422 S.E.2d 452 (1992).

<sup>5</sup> Striefel v. Charles-Keyt-Leaman Partnership, 1999 ME 111, 733 A.2d 984 (Me. 1999).

<sup>6</sup> Vezey v. Green, 35 P.3d 14 (Alaska 2001).

<sup>7</sup> Vezey v. Green, 35 P.3d 14 (Alaska 2001); Striefel v. Charles-Keyt-Leaman Partnership, 1999 ME 111, 733 A.2d 984 (Me. 1999).

<sup>8</sup> Proctor v. Heirs of Jernigan, 273 Ga. 29, 538 S.E.2d 36 (2000).

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## § 299. Questions of law and questions of fact

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  115

Adverse possession issues are usually a mixed question of law and fact.<sup>1</sup> Whether the facts exist that constitute adverse possession is for a jury to determine, but whether the facts as delineated are sufficient to constitute adverse possession is a question of law for the court.<sup>2</sup> Ordinarily, however, the trier of fact determines whether the elements of adverse possession have been proven<sup>3</sup> and whether title is acquired by adverse possession.<sup>4</sup> Only when reasonable minds could not differ does the issue become one of law for the court.<sup>5</sup>

The character of the possession is a question for the jury.<sup>6</sup> Whether the claimants' acts of dominion were sufficient to create title by adverse possession is a question of law<sup>7</sup> although whether those acts were really done, and the circumstances under which they were done, are questions of fact.<sup>8</sup> Where there is no evidence of enclosure or cultivation, notoriety, and exclusivity become questions of fact.<sup>9</sup> A claimant's subjective belief that the claimed property adversely belonged to him or her, standing alone, fails to raise a fact issue.<sup>10</sup>

Ordinarily, intent to rely on the statute of limitations as a basis for title presents a fact question.<sup>11</sup> While a claim of right can be inferred from unequivocal conduct that is inconsistent with any other reasonable inference, whether the conduct relied upon is sufficient to establish a claim of right is generally a question for the jury.<sup>12</sup>

Whether possession is adverse to the true owner is a question of fact.<sup>13</sup>

An acknowledgment by the adverse possessor of title in another is evidence tending to show that the claim was not truly adverse, and the weight to be given the acknowledgment is for the trier of fact.<sup>14</sup> The determination of facts which lead to either a presumption of adverse and hostile use of the property or a presumption of a permissive use is within the prerogative of the trial court.<sup>15</sup>

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#### Footnotes

- <sup>1</sup> Horton v. Smith-Richardson Inv. Co., 81 Fla. 255, 87 So. 905 (1921); Pirkle v. Turner, 281 Ga. 846, 642 S.E.2d 849 (2007); Weeks v. Krysa, 2008 ME 120, 955 A.2d 234 (Me. 2008); Pike v. Williamson, 2011 WL 6371000 (Mo. Ct. App. S.D. 2011), reh'g and/or transfer denied, (Jan. 11, 2012); Stark v. Akard, 1957 OK 181, 313 P.2d 790 (Okla. 1957); In re Estates of Allen, 190 Vt. 301, 2011 VT 95, 30 A.3d 662 (2011); Herrin v. O'Hern, 168 Wash. App. 305, 275 P.3d 1231 (Div. 1 2012).
- <sup>2</sup> Drawdy Inv. Co. v. Leonard, 158 Fla. 444, 29 So. 2d 198 (1947); Pirkle v. Turner, 281 Ga. 846, 642 S.E.2d 849 (2007); Weinstein v. Hurlbert, 2012 ME 84, 45 A.3d 743 (Me. 2012); Herrin v. O'Hern, 168 Wash. App. 305, 275 P.3d 1231 (Div. 1 2012).
- <sup>3</sup> Strother v. Mitchell, 2011 Ark. App. 224, 382 S.W.3d 741 (2011).
- <sup>4</sup> Koch v. Packard, 48 Kan. App. 2d 281, 294 P.3d 338 (2012).
- <sup>5</sup> Durkin Village Plainville, LLC v. Cunningham, 97 Conn. App. 640, 905 A.2d 1256 (2006); Grappo v. Blanks, 241 Va. 58, 400 S.E.2d 168 (1991).
- <sup>6</sup> Pioneer Mill Co., Ltd. v. Dow, 90 Haw. 289, 978 P.2d 727 (1999), as amended on denial of reconsideration, (May 11, 1999) and as corrected, (June 13, 2006).
- <sup>7</sup> McGeechan v. Sherwood, 2000 ME 188, 760 A.2d 1068 (Me. 2000); Schultz v. Dew, 1997 SD 72, 564 N.W.2d 320 (S.D. 1997).
- <sup>8</sup> Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232 (Me. 2000).
- <sup>9</sup> Friendship Baptist Church, Inc. v. West, 265 Ga. 745, 462 S.E.2d 618 (1995).
- <sup>10</sup> Martin v. McDonnold, 247 S.W.3d 224 (Tex. App. El Paso 2006).
- <sup>11</sup> State ex rel. Gallion v. Graham, 273 Ala. 634, 143 So. 2d 810 (1962); Greenway Parks Home Owners Ass'n v. City of Dallas, 159 Tex. 46, 312 S.W.2d 235 (1958).
- <sup>12</sup> Young Kee Kim v. Douval Corp., 259 Va. 752, 529 S.E.2d 92 (2000).
- <sup>13</sup> Emerson v. Linkinogger, 2011 Ark. App. 234, 382 S.W.3d 806 (2011); Beaver Creek Ranch, L.P. v. Gordman Leverich Ltd. Liability Ltd. Partnership, 226 P.3d 1155 (Colo. App. 2009); Mastroianni v. Wercinski, 158 N.H. 380, 965 A.2d 1139 (2009).
- <sup>14</sup> Shanks v. Collins, 1989 OK 115, 782 P.2d 1352 (Okla. 1989).
- <sup>15</sup> A.B. Cattle Co. v. Forgey Ranches, Inc., 943 P.2d 1184 (Wyo. 1997).

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#### VI. Practice and Procedure

##### C. Trial

## § 300. Instructions to jury

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  116

#### Forms

Forms relating to instructions to jury, generally, see Am. Jur. Pleading and Practice Forms, Adverse Possession  
[\[Westlaw® Search Query\]](#)

Generally, jury instructions are proper if they provide guidance to the jury in making its determination,<sup>1</sup> are correct statements of the law, and are not erroneous as a charge on the facts.<sup>2</sup> The court may give such instructions on the law as are supported by the evidence presented in the case<sup>3</sup> and decline to give an instruction on adverse possession where possession for the statutory period is not established.<sup>4</sup> Unnecessary instructions need not be given.<sup>5</sup>

The use of an instruction that a failure to pay property taxes may be considered evidence of the absence of a bona fide claim of title may be proper where supported by the evidence.<sup>6</sup> An instruction that if a person occupies land by mistake without intention to claim title to it, adverse possession is unavailable is proper.<sup>7</sup>

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#### Footnotes

<sup>1</sup> [Shouse v. Roberts](#), 737 S.W.2d 354 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (Dec. 16, 1987).

<sup>2</sup> [Harrelson v. Reaves](#), 219 S.C. 394, 65 S.E.2d 478, 43 A.L.R.2d 1 (1951).

<sup>3</sup> [Georgia Power Co. v. Irvin](#), 267 Ga. 760, 482 S.E.2d 362 (1997).

<sup>4</sup> Noland v. Wise, 333 S.W.2d 501 (Ky. 1960).

<sup>5</sup> McLaren v. Beard, 811 S.W.2d 564 (Tex. 1991).

<sup>6</sup> Georgia Power Co. v. Irvin, 267 Ga. 760, 482 S.E.2d 362 (1997).

<sup>7</sup> Crosby v. Baizley, 642 A.2d 150 (Me. 1994).

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##### C. Trial

## § 301. Verdict and findings

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#### West's Key Number Digest

West's Key Number Digest, [Adverse Possession](#)  117

The trial court must be scrupulous in chronicling the relevant facts and delineating the linkage of those facts and the ultimate conclusion of adverse possession vel non; the court must discuss not only the evidence that supports its decision but also all substantial evidence contrary to its opinion.<sup>1</sup> It is proper for the court to decree the specific rights of the parties, incorporating the jury's factual findings into the judgment.<sup>2</sup> A judgment in an adverse possession action is adequate where it is explicit as to the ownership of the land in question.<sup>3</sup> An error in the conclusions made by the court which is not critical to the adverse possession findings will not invalidate those findings,<sup>4</sup> but the failure of the court to adequately address, in its findings, critical evidence introduced is improper.<sup>5</sup> Where there is conflicting evidence as to whether a landowner's claim was under color of title or claim of right, the trial court should make findings on that issue.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [Brown v. Gobble](#), 196 W. Va. 559, 474 S.E.2d 489 (1996).

<sup>2</sup> [Georgia Power Co. v. Irvin](#), 267 Ga. 760, 482 S.E.2d 362 (1997).

<sup>3</sup> [Turner v. Reed](#), 606 A.2d 194 (Me. 1992).

<sup>4</sup> [Brown v. Whitcomb](#), 150 Vt. 106, 550 A.2d 1 (1988).

<sup>5</sup> [Whittemore v. Cooley](#), 147 Vt. 529, 520 A.2d 1002 (1986).

<sup>6</sup> [Turner v. Floyd C. Reno & Sons, Inc.](#), 769 P.2d 364 (Wyo. 1989).

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Works.